(33)

No. 04-1528
Vide 04-1530, 04-1697
Title: Neil Randall, et al., Petitioners
v.
William H. Sorrell, et al.
Docketed: May 16, 2005
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (00-9159, 00-9180, 00-9231, 00-9239, 00-9240)
Decision Date: August 18, 2004
Rehearing Denied: February 11, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 11 2005	Petition for a writ of certiorari filed. (Response due June 15, 2005)
May 25 2005	Letter of May 18, 2005, from counsel for petitioners received.
Jun 7 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents Vermont Public Interest Research Group, et al., defendants-intervenors VIDED.
Jun 14 2005	Response and partial opposition to petition from respondents William H. Sorrell, et al. filed. VIDED.
Jun 14 2005	Brief amici curiae of Bill Bradley and Alan Simpson filed. VIDED.
Jun 15 2005	Brief amici curiae of TheRestofUs.Org, et al. filed. VIDED.
Jun 15 2005	Brief amici curiae of Connecticut, et al. filed. VIDED.
Jun 15 2005	Brief amici curiae of Secretaries of State of New Hampshire, Oregon, and Wisconsin filed. VIDED.
Jun 15 2005	Brief amici curiae of John F. Reed, et al. filed. VIDED.
Jun 15 2005	Brief amici curiae of National Association for the Advancement of Colored People, et al. filed. VIDED.
Jun 15 2005	Brief amici curiae of Current and Former State Court Justices and Judges filed. VIDED.
Jun 15 2005	Response and partial opposition to petitions from Respondents-Intervenors filed. VIDED.
Aug 3 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Petition GRANTED The petition for a writ of certiorari in No. 04-1530 is granted. The petition for a writ of certiorari in No. 04-1697 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Oct 21 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 14, 2005. VIDED.
Oct 28 2005	Consent to the filing of amicus briefs in support of either party received from counsel for respondents/ conditional cross-petitioners William H. Sorrell, et al. VIDED.
Nov 23 2005	Extension of time within which to file respondents' brief on the merits to and including February 8, 2006. VIDED.
Nov 30 2005	SET FOR ARGUMENT on Tuesday, February 28, 2006.
Dec 13 2005	Joint appendix filed. VIDED.
Dec 13 2005	Brief of petitioners Neil Randall, et al. filed.
Dec 14 2005	Brief of petitioners in 04-1530,Vermont Republican State Committee, et al. filed.

	VIDED.
Dec 14 2005	Brief amicus curiae of Mitch McConnell filed. VIDED.
Dec 14 2005	Brief amicus curiae of Republican National Committee filed. VIDED.
Dec 14 2005	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Dec 14 2005	Brief amici curiae of Center for Competitive Politics, et al. filed. VIDED.
Dec 20 2005	CIRCULATED.
Dec 27 2005	Motion for divided argument filed by petitioner Randall, et al. and Vermont Republican State Committee, et al. VIDED.
Jan 11 2006	Application (05A643) of Sorrell, et al. and Vermont Public Interest Research Group, Inc., et al. to file response briefs on the merits in excess of page limits, submitted to Justice Ginsburg.
Jan 13 2006	Opposition to application filed.
Jan 13 2006	Reply to opposition filed.
Jan 17 2006	Application (05A643) denied by Justice Ginsburg.
Jan 18 2006	Motion for additional time to argue and for divided argument filed by respondents Sorrell, et al. and Vermont Public Interest Research Group, et al. VIDED.
Jan 23 2006	Motion for divided argument filed by petitioners DENIED.
Jan 23 2006	The motion of respondents for additional time for oral argument is DENIED. The motion of respondents for divided argument is GRANTED and the time is to be divided as follows: 20 minutes for respondents Sorrell, et al. and 10 minutes for respondents Vermont Public Interest Research Group, et al.
Feb 7 2006	Brief amicus curiae of ReclaimDemocracy.Org filed. VIDED. (Distributed)
Feb 8 2006	Brief amicus curiae of Center for Democracy and Election Management filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Secretaries of State of New Hampshire, new Mexico, Oregon and Wisconsin filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of John F. Reed, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of TheRestofUS.Org, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Heidi-Behrens-Benedict, Janice Bowling, and Don Hooper filed. (Distributed)
Feb 8 2006	Brief of respondents/cross-petitioners William H. Sorrell, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief of respondents/ cross-petitioners Vermont Public Interest Research Group, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Current and Former State Court Justices and Judges filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Equal Justice Society, et al. filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of John McCain, Russell Feingold, Christopher Shays and Martin Meehan filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Democratic National Committee filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Bill Bradley and Alan Simpson filed. VIDED. (Distributed)
Feb 8 2006	Brief amici curiae of Connecticut, et al. filed. VIDED. (Distributed)
Feb 10 2006	Motion for leave to file amici brief of Norman Dorsen, et al.out of time filed. VIDED.

	(Distributed)
Feb 20 2006	Reply of petitioners Vermont Republican State Committee, et al. filed. VIDED. (Distributed)
Feb 22 2006	Reply of petitioners Neil Randall, et al. filed. (Distributed)
Feb 27 2006	Motion for leave to file amicus brief filed by Norman Dorsen, et al. GRANTED.
Feb 28 2006	Argued. For petitioners: James Bopp, Jr., Terre Haute, Ind. For respondents: Sorrell, et al: William H. Sorrell, Attorney General, Montpelier, Vt. For respondent: Vermont Public Interest Research Group, Brenda Wright, Boston, Mass.

Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on candidate expenditures violate the First Amendment and this Court's decision in *Buckley v. Valeo,* 424 U.S. 1 (1976).

2. Whether Vermont's treatment of independent expenditures by political parties and committees as presumptively coordinated if they benefit fewer than six candidates, and thereby subject to strict contribution and expenditure limits, is consistent with the First Amendment and this Court's decision in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

3. Whether Vermont's contribution limits, which are the lowest in the country, which allow only a single maximum contribution in an entire two-year general election cycle, and which prohibit even state political parties from contributing more than $400 to their gubernatorial candidate, fall below an acceptable constitutional threshold and should be struck down.

LIST OF PARTIES

Petitioners are Neil Randall, George Kuusela, John Patch, Steven Howard, Jeffrey Nelson, and the Libertarian Party of Vermont.

Consolidated Plaintiffs are Marcella Landell, Donald R. Brunelle, Vermont Right to Life Committee, Inc., Political Committee, Vermont Republican State Committee, and Vermont Right to Life Committee-Fund for Independent Political Expenditures.

Respondents are the Attorney General of the State of Vermont, William H. Sorrell, the Secretary of State of the State of Vermont, Deborah Markowitz, and various state and local officials charged with enforcement of the challenged statute: John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, and Robert L. Sand.

Respondent-Intervenors are Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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OPINIONS AND ORDERS BELOW

The original decision of the District Court finding 17 V.S.A. §§ 2801-2809 constitutional in part and unconstitutional in part, was entered on August 10, 2000. The court's opinion is reported as *Landell v. Sorrell*, 118 F.Supp.2d 459 (D.Vt. 2000), and is reprinted in the Appendix ("App.") at App. 21a-89a. The Second Circuit panel decision affirming the District Court judgment in part and vacating it in part, and remanding for further proceedings was entered on August 7, 2002. That opinion, 300 F.3d 129 (2nd Cir. 2002), was withdrawn and is not reprinted in the appendix. On August 18, 2004, the Second Circuit issued an amended opinion, 382 F.3d 91 (2nd Cir. 2004), which is reprinted at App. 90a-312a.

Rehearing and rehearing *en banc* were denied on February 11, 2005. App. 313a-314a. The *Order* denying the petition was twice subsequently amended to reflect that the rehearing petition was denied by a vote of 6-5. The second *Order* contains the separate concurring and dissenting opinions of the circuit judges, and is reprinted at App. 315a-344a.

JURISDICTION

The Second Circuit's amended decision reversing in part and affirming in part the District Court's decision was entered on August 18, 2004. On February 11, 2005, that court entered an order denying plaintiffs' petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I, § 1.

1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) is set out in full in the Appendix to the petition. App. 1a-20a.

STATEMENT OF THE CASE

This is a First Amendment challenge to Vermont's comprehensive campaign finance law, 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64"). Vermont's law was adopted in 1997 with the "express intent" of challenging *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and became effective the day after the November 1998 election. Act 64 challenged *Buckley* by imposing mandatory, unprecedented limits on the amount of money candidates for statewide or legislative office may lawfully raise or spend on their campaigns. These spending limits apply to all candidates, even those who spend their own funds or obtain contributions from legal sources. The Act broadly defines an expenditure to include various personal and in-kind expenses, and limits the right of political organizations to make independent expenditures supporting candidates by presuming that certain expenditures are coordinated with the candidate. The Act also imposes the lowest contribution limits in the country, which are enforced on a per-election-cycle basis. The limits apply equally to political parties and committees. A separate provision limits the amount of money candidates can raise from out-of-state sources.

This case arises from three separate lawsuits filed in 1999 and 2000, which were consolidated in the district court. The plaintiffs in these consolidated matters are involved in various capacities in Vermont electoral politics and include a sitting legislator seeking re-election, candidates for future offices, political parties and political committees, and individual contributors and listeners. A number of individuals and advocacy groups were allowed to intervene as defendants in support of the Act. After a ten-day bench trial in May and June, 2000, the district court upheld many of the challenged provisions, but enjoined enforcement of the candidate spending

limits, the candidate contribution limits as applied to contributions from political parties, and the restriction on out-of-state contributions. App. 24a-26a.

All parties appealed the district court's decision to the Second Circuit. The case was argued there in May of 2001 and an initial 2-1 opinion was issued in August, 2002, in which the court upheld in large part both Act 64's contribution and expenditure limits. App. 95a. After Plaintiffs filed a motion for rehearing, the panel withdrew this opinion. *Id.* Two years later the same divided panel of the court of appeals again upheld most of the provisions of Act 64, but remanded to the district court to decide whether the expenditure limits were narrowly tailored to advance the State's interests. App. 96-97. Plaintiffs' motion for rehearing *en banc* was denied, 6-5, generating three separate dissenting opinions on the issue whether *en banc* hearing should have been granted. App. 315a. Petitioners now seek *certiorari* in this Court.

Vermont's Act 64

Spending Limits. Act 64 limits all candidate spending during a two-year election cycle.[1] 17 V.S.A. § 2805a. App. 6a-7a. Candidates for statewide office are restricted to varying amounts depending upon the position sought, with the candidate for governor limited to $300,000; the lieutenant governor to $100,000; and candidates for other statewide offices to $45,000. *See* 17 V.S.A. § 2805a(a)(1)-(3). App. 6a. Candidates for state senator and county office are limited to spending $4,000, with senate candidates permitted an additional $2,500 per seat in multi-seat districts. *Id.* Candidates for state

[1] Both the spending limits and the contribution limits adopted by Vermont depart from the federal model and the laws in virtually every other state because they apply on a two-year election cycle basis, rather than a per election basis – regardless of whether a candidate has a primary. *See* 17 V.S.A. §§2801(9), 2805(a), 2805a(a). App. 2a, 4a-5a, 6a. Only candidates for governor and lieutenant governor have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions" and adhere to various other restrictions. *See* 17 V.S.A. § 2851-2856. App. 14a-19a.

representative in single-member districts can spend no more than $2,000, and those in two-member districts no more than $3,000. 17 V.S.A. § 2805a(a)(5). App. 6a.

Act 64 defines candidate "expenditures" to include a "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value ... for the purpose of influencing an election." 17 V.S.A. § 2801(3). App. 1a. The breadth of this language is indisputable, and was chosen purposely to ensure that limits could not be avoided. Given its ordinary meaning the language includes the value of the use of personal phones, computers, offices, rooms in residences, paper, pencils, personal automobiles, etc. App. 211a. The evidence at trial and interpretative guidance provided by the Vermont Secretary of State, who is charged with administrating the Act, supports a broad reading of the term "expenditure." App. 211a-219a; Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (January 9, 2001). *Id.* Act 64 thus treats all manner of typical grassroots campaign activities, such as a candidate's use of his/her own car and food provided by supporters at "meet the candidate" events, as campaign expenditures which count toward the applicable spending limits. Candidates, therefore, as well as their volunteers, may not drive their personal vehicles for campaign purposes without recording every mile driven and treating the costs of that driving as a campaign expenditure. App. 229a-232a, 241a-242a. The use of personal phone lines, the value of donated office space or professional services, and the costs of complying with the law are all considered to be "expenditures" under the Act. App. 225a-226a, 241a-242a. The spending limits — and the broad definition thereof — apply equally to candidates who exclusively use personal funds to finance their campaigns. 17 V.S.A. § 2805a(a). App. 6a.

Related Expenditures. Vermont's spending limits must be reviewed in the context of the "related expenditure" provision, which counts certain expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (thus

counted against the candidate's permissible budget). 17 V.S.A. § 2809. App. 8a-10a. Spending is "related" when it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." 17 V.S.A. § 2809(c). App. 8a. The broad definition of "expenditure" applies to related expenditures as well, and the language requiring intentional "facilitation," "solicitation" or "approval" has been given a broad interpretation by those charged with enforcing the act. App. 222a-223a, 308a-312a. Spending by individual supporters may be treated as a "related expenditure" when it exceeds $50. 17 V.S.A § 2809(b). App. 8a.

Act 64 creates a rebuttable presumption that expenditures made by political parties or political action committees are, in fact, "related" (i.e., coordinated) expenditures – thus counting as both contributions and candidate spending – if they primary benefit six or fewer candidates. Candidates may bring a petition in state court seeking determination as to whether particular third party expenditures should be considered related. 17 V.S.A. § 2809(e). App. 9a. Until such proceedings are resolved, however, candidates act at their peril. Furthermore, the cost of rebutting the statutory presumption is charged against the candidate's spending limit, which is apparently the case even if the candidate succeeds in establishing that the presumption does not apply. App. 225a-226a.

Contribution Limits. Act 64 also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party or political action committee. 17 V.S.A. § 2805(a). App. 4a-5a. Slightly higher limits apply to candidates for state senate or county office ($300) and candidates for statewide office ($400). *Id.* Political action committees and political parties may accept no contribution greater than $2,000.

Id. For the purpose of all these contribution limits, a political party's state, county and local branch (and national and regional affiliates of the party) count as a single unit. 17 V.S.A. § 2801(5). App. 2a. These limits apply to all cash, in-kind, and "related" contributions, following the broad definitions described above. The single limit applies during an entire 2-year general election cycle whether or not the candidate faces a primary. Under these limits, the Democratic and Republican candidates for governor in Vermont can accept no more than $400 each (in cash, in kind or "related"), every two years, from their respective parties. 17 V.S.A. § 2805(a). App. 4a-5a.[2]

The Proceedings Below

The State's witnesses at trial opined that the State should be able to regulate campaign spending and political speech in much the way a public utility is regulated. App. 195a. In keeping with this philosophy, they lent their support at trial to pervasive regulation of campaign finance and a vision of an "old fashioned" politics where low cost, grass roots campaigning ruled the day. Defendants' witnesses repeatedly testified that they preferred "down home," "traditional," or "old fashioned" campaigns; yet, even these "old fashioned" methods of campaigning are subject to regulation – and limitation – under Act 64. App. 198a, 229a-232a.

Plaintiffs argued in response that it is not constitutionally appropriate for the State of Vermont to determine how, or how much, candidates should campaign. Under the broad definition of "expenditure" set forth in Act 64, nearly anything a candidate or contributor does will be counted towards the respective limits. Indeed, by defining the term so broadly, Vermont has side-stepped the debate over the

[2] Other provisions of Act 64's comprehensive scheme were not challenged by the petitioners, with one exception. Act 64 limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. 17 V.S.A. § 2805(c). App. 5a. The court of appeals unanimously affirmed the district court's ruling that this provision was unconstitutional. Accordingly, that issue is not presented by this petition.

relationship between money and speech in the campaign finance context. Once a candidate has reached the mandatory spending limit, she cannot even drive her own car to the village square to give a speech, or to go door-to-door campaigning. App. 197a. Relying on *Buckley*, plaintiffs argued below that it is for the candidate to determine how many mailings to send, how many doors to knock on, how many ads to run, and how often to drive to the village green to meet with voters.

Spending Limits. The district court enjoined enforcement of candidate spending limits on the strength of *Buckley*. The court of appeals divided 2-1 on this critical issue. In a decision directly at odds with the Sixth and Eighth circuits, *see* p. 13, *supra*, the panel majority concluded that this Court's holding in *Buckley* "does not operate as a *per se* bar to expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests." App. 91a.

The majority found that Vermont's spending limits were supported by two government interests that it regarded as compelling, at least in tandem: limiting the time that candidates spend on fundraising and addressing the corrosive effect of public cynicism on the electoral process, which the Second Circuit characterized as a form of corruption. App. 144a-146a.

The majority next turned to the issue of whether the spending limits established by Act 64 allow for "effective advocacy." Using a test developed in the contribution limit context, the court found that the expenditure limits were not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." App. 152a-157a (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Although the court of appeals recognized that there was conflicting evidence submitted at trial, it reviewed historical data from "average" races in which spending was reported under the prior law, and found many candidates spent within the limits of the new law. Thus, according to the majority below, most candidates would not be hampered by the new limits. App. 153a-154a.

Finally, the majority considered whether the Act's expenditure limits were narrowly tailored to advance the State's asserted interests. Because it could not determine whether other, less restrictive alternatives could achieve the same goals of preserving candidate time and diminishing public cynicism, the court remanded the case to the district court for further proceedings. App. 164a-168a.

Judge Winter forcefully dissented from both the majority's assessment of the evidence and its legal conclusions. App. 190a-194a. At the most fundamental level, he disagreed with the majority's view that the constitutionality of spending limits remains an open question after *Buckley*. App. 207a, 258a. Like the Sixth and Eighth Circuits, Judge Winter took the position that any re-examination of that issue must come from this Court. App. 258a-265a. In addition, he noted that the record did not, in fact, support the majority's assertion that fundraising in Vermont was unduly burdensome on candidates and officeholders. As Judge Winter recognized, it is easy to state that candidates spend too much time fundraising, but "it is not a testable proposition." App. 274a. That is because,

> [t]here is often no dividing line between donors and "ordinary citizens" who support a candidate or between fundraising and other campaign events. Meetings with supportive voters can often be described as either "fundraising" or as "person-to-person contact with voters" depending upon the point to be made.

Id. Moreover, as Judge Winter explained, incumbents and challengers are not similarly situated. Incumbents typically need less money to ensure re-election and can raise it more easily. Thus, what is perceived as a burden by one candidate may be perceived as a necessity by another.[3]

[3] Act 64 does attempt to ameliorate the incumbent's advantage by providing that incumbents running for re-election may only spend 85% or 90% of the standard limits, depending on the office sought. 17 V.S.A. § 2805a(c). App. 7a. The evidence at trial showed that the legislature chose these percentages arbitrarily, with no empirical basis. As Judge Winter pointed out in his dissent, the benefits of incumbency are not so easily overcome. App. 275a, 285a-286a.

Judge Winter also sharply criticized the majority's reliance on "average" spending to determine whether Vermont's spending limits would impair a candidate's ability to engage in "effective advocacy." As Judge Winter pointed out, the use of an average inevitably obscures the critical difference between contested races and uncontested races. An amount that may be sufficient for a candidate who is running unopposed may be grossly insufficient for a candidate who faces both a hotly contested primary and general election. Historical data shows that in contested elections significantly more money had been spent than would be allowed under the new limits. App. 236a-240a. As Judge Winter further observed, any comparison with historical spending rates needs to take into account the expanded definition of a covered expenditure under Act 64, including related expenditures, which the majority did not do.[4] App. 233a-234a. Fundamentally, Judge Winter pointedly disagreed with the majority that the test for effective advocacy developed in the contribution limit context – the "level of notice" standard - had any applicability to the constitutionality of spending limits. Where a *direct* restriction on speech is concerned, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice." App. 282a-285a.

And, unlike the majority, Judge Winter saw no need for a remand to explore less restrictive alternatives. That issue was decided by *Buckley*, which held that spending limits are not the least restrictive means of advancing the government's interest in preventing corruption or its appearance. 424 U.S. at 58-59. Judge Winter explained, moreover, that it was "self-evident"

[4] Witnesses at trial testified that the one-size-fits-all approach ignores geographic differences between districts, and a candidate with a physical disability might find traditional door-to-door campaigning difficult or impossible. Overriding issues of the day such as education finance or civil unions affect the manner, intensity, and cost of campaigns. App. 243a-245a. In the case of legislative candidates, legal assistance alone could literally exhaust all the expenditures allowable under the act. App. 235a.

that the State could, if it chose, promote its asserted interests through "a combination of public and private funding with low contribution limits." App. 193a-194a, 292a, 300a. In a sharply worded dissent from the *Denial of Rehearing En Banc*, five members of the court expressed their total agreement with Judge Winter's analysis that *Buckley* categorically rejects candidate expenditure limits and his conclusion that a remand was completely unnecessary. App. 323a, 328a. The dissenting judges were unusually critical of the majority's decision to ignore *Buckley*'s holding and to "provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject." App. 341a.

Related Expenditures. Plaintiffs had no quarrel below with the basic premise that third party spending which is *actually* coordinated with a candidate can constitutionally be treated as a contribution to that candidate. Such a provision serves to avoid evasion of contribution limits that would otherwise apply. Plaintiffs challenged the presumption contained in § 2809(d), however, because it presumes that certain independent expenditures are coordinated and automatically treats them as expenditures by the candidate, placing the burden on the candidate (or contributor), at their peril, to disprove such treatment. *See* 17 V.S.A. §2809(e) (civil proceedings in state court); §2806 (criminal penalties). App. 7a-9a. The district court upheld the related expenditure provision of § 2809(d) as to contributions, relying on the theory that the presumption of coordination was rebuttable. App. 85a. The district court struck down the provision treating related expenditures as candidate expenditures after deciding that limits on candidate expenditures were *per se* unconstitutional. *Id.*

A majority of the court of appeals found no constitutional problem with the related expenditure provision as applied to contributions, much for the same reason found by the district court. Giving the statutory language a narrow reading, the court reasoned that a candidate could rebut the presumption of coordination in any enforcement proceeding by simply testifying that he or she had not "facilitated," "solicited," or

"approved" the expense. App. 184a. However, the majority remanded the question of related expenditures as it affects a candidate's spending limit, because the district court, having held spending limits unconstitutional, had not separately analyzed this issue. App. 168a.

In dissent, Judge Winter would have found § 2809(d) unconstitutional because it places an undue burden on candidates to disprove coordination of independent expenditures under a regime where the costs of defending oneself also counted against the limits. App. 222a-225a. Judge Winter also found the narrowing construction adopted by the majority to be contrary to advice given by Vermont's Secretary of State, who is charged with administering the law. App. 225a, 308a-312a. As such, the related expenditure provision would work untold mischief and chill much protected political speech by requiring candidates, parties, and supporters to speak and act only at their peril. App. 222a-225a, 289a.

Contribution Limits. The district court upheld the contribution limits as to individuals and political committees, finding that they advanced the State's interest in preventing corruption or its appearance. App. 52a-62a, 77a-80a. The court struck down the limits as applied to political parties, finding the $200, $300 and $400 amounts to be so low that they would essentially remove political parties from their traditional, historical role in elections. App. 72a-76a ("Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."). The court of appeals, relying on *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 480-482 (2001) (*Colorado II*), felt there was no basis to distinguish between political parties and individuals or other organizations. App. 177a-181a. Accordingly, the court reversed the district court and upheld the constitutionality of all Act 64's contribution limits. App. 168a-181a.

In so holding, the court again relied on evidence from "average" contributions in prior elections. App. 170a. The court ignored plaintiffs' evidence that such historical averages are constitutionally inapt and would harm many candidates in

contested elections. The evidence at trial showed that a significant percentage of legislative candidates would be prevented from running effective campaigns under the $200 and $300 limits, and that the governor's race would be significantly impacted by the $400/every 2-year limit. The limits would have their greatest effect on seriously contested elections, and will harm challengers the most. Although Judge Winter did not dissent from the court's holding on contribution limits, Chief Judge Walker, in his opinion dissenting from the denial of rehearing *en banc*, was especially critical of the court's holding. He characterized the contribution limits as "laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them." App. 330a-331a. The majority wholly failed to consider the contribution limits in combination with the expenditure limits or to discuss how they are inevitably tied to the State's goal of curbing campaign spending.

The court of appeals similarly overlooked the fact that the district court's finding that limits this low still allowed for effective campaigning was inevitably tied to that court's ruling that the limits on party contributions to candidates were unconstitutional. The district court's order allowed political parties to make larger contributions to candidates and thus moderated, to some extent, the effect of the low individual contribution limits. App. 72a-76a.

REASONS FOR GRANTING THE WRIT

The decision below represents the first federal appellate ruling since *Buckley*, to uphold candidate expenditure limits. Its reasoning is inconsistent with a core holding in *Buckley*, which was left undisturbed by this Court's more recent holding in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 134 (2003). This case therefore raises issues of obvious national importance. If the constitutional rules governing political campaign financing are now to be changed, the responsibility lies with this Court. That is especially so because the decision

below also creates at least two separate circuit conflicts on vital issues of First Amendment law. Finally, the decision below approved contribution limits that are significantly lower than any this Court has ever approved, thus highlighting a continuing ambiguity about the appropriate First Amendment standards to apply in this context.

1. In upholding the candidate expenditure limits imposed by Vermont's campaign finance law, the Second Circuit assumed that the appropriate constitutional measuring stick is whether those limits "drive the sound of a candidate's voice below the level of notice." App. 153a. That text, borrowed from this Court's discussion of contribution limits, has never previously been used by any court to determine the appropriate amount of candidate speech in a political campaign. Nor should it be in a constitutional democracy committed to the principle that "debate on public issues should be uninhibited, robust, and wide-open..." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Under this Court's jurisprudence, contribution limits are justified by the State's compelling interest in avoiding corruption or the appearance of corruption. Once contribution limits are set at a suitable level, however, that interest is fully satisfied. Acknowledging that fact, the Second Circuit instead purported to justify Vermont's expenditure limits on the basis of an all encompassing definition of corruption attributed to unlimited campaign spending, and noted that the limits would relieve political candidates from the burden of excessive fundraising and provide incumbents with more time to focus on their official duties. Aside from the irony that the burden of political fundraising in Vermont has been most significantly enhanced by the unreasonably low contribution limits set by the legislature, the First Amendment does not permit the State to decide how much speech is enough for either candidates or voters. A remand should not be required to reaffirm this essential First Amendment value.

2. Because the decision below departs so dramatically from *Buckley*, it is not surprising that it also creates a direct conflict with at least two other circuit courts. Specifically, both the Sixth and the Tenth Circuits have held that, unless and until *Buckley* is overruled, it stands as a bar to the type of spending limits upheld by the Second Circuit in this case. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). In contrast to the Second Circuit, the Sixth and Tenth Circuits have each concluded as a matter of law that expenditure limits cannot be upheld under *Buckley* on the basis of the public's dissatisfaction with the electoral process or the demands on candidate time attributed to the increased need for fundraising. Only this Court can resolve that dispute.

3. The Second Circuit decision raises a separate conflict in the lower courts about the permissible use of statutory presumptions to automatically treat independent expenditures as contributions to – and expenditures by – a candidate. Although that issue was partially resolved in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996) ("*Colorado I*"), the Courts of Appeal are in conflict over whether the holding in that case can be avoided if the presumption is not strictly conclusive. The court below upheld Vermont's related expenditure provision – that automatically categorizes certain political party and political committee expenditures as coordinated – as a means of avoiding evasion of the State's contribution and expenditure limits. The court distinguished this Court's decision in *Colorado I* because the statute contains a provision that allows the party or candidate to rebut the presumption of coordination in any adversarial proceeding subsequently brought. However, in *Iowa Right to Life Committee, Inc v. Williams*, 187 F.3d 963 (8th Cir. 1999), the court struck down a far less onerous disclosure statute that automatically attributed independent expenditures to candidates unless the candidate filed a statement disavowing any affiliation with the expenditure. The decision below is thus in direct conflict with the Eighth Circuit

in *Williams* as to the application of *Colorado I* to presumptions of coordination.

4. The State of Vermont has also exceeded the bounds of permissible regulation of campaign contributions. The State's contribution limits are the lowest and most oppressive in the country. They arbitrarily apply on a per cycle basis and apply equally to political parties and political committees. One of the principal functions of these quintessential political organizations is to aggregate small contributions in order to finance candidates of their choice. These organizations are effectively and unnecessarily shut out of the electoral process, especially when the limits are considered in tandem with the related expenditure provision discussed above. The limits are especially onerous because all state and local political parties are considered a single entity for purposes of the statute.

The Second Circuit misread this Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 as giving governments the green light to establish contribution limits at minimal – even nominal – levels so long as they allow for "effective advocacy." That misstates the standard by half. To be valid, the limits must first be "closely drawn" to match the State's interest in preventing corruption or its appearance. *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003). The Vermont limits do not meet that standard because they were primarily adopted to correspond to expenditure limits that are themselves constitutionally suspect and unquestionably low. As a result, the contribution limits are set at unrealistic levels that will choke off many healthy sources of campaign funds from a candidate's supporters, including from the very same political organizations that have historically provided financing for candidates. Moreover, the adoption of limits on a per cycle basis will arbitrarily favor some candidates, particularly incumbents, over others. The decision below opens the door to unrestrained control over how political campaigns are financed and the role of political parties and committees. The Court should intervene to provide further guidance in this critical area of the electoral process.

I. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Candidate Expenditures

Where core First Amendment principles are at stake, courts must bring a healthy skepticism to claims that candidates and non-candidates spend too much time and money on the political process. *Buckley*, 424 U.S. 1. The central holding in *Buckley* is that while it is permissible to limit campaign contributions, spending money on one's own speech must be permitted. Despite changes in the composition of the Court, that holding has stood the test of time. *See Colorado II*, 533 U.S. at 441.

Because expenditure limitations necessarily restrict political expression at the core of the electoral process and the First Amendment, they can survive a constitutional attack only if justified by a compelling State interest, *Colorado I*, 518 U.S. at 609; *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 251-52 (1986), and narrowly tailored to serve that interest, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985). Conversely, limits on contributions have been treated as a less direct restraint on speech and subject to less exacting scrutiny. *See Shrink*, 528 U.S. at 378 (regulation of contributions must be "closely drawn to match a sufficiently important interest"). The doctrinal distinction between contributions and expenditures was affirmed in *Colorado II*, 533 U.S. at 441-442, and even more recently in *McConnell*, 540 U.S. at 134.

The basis for the distinction between expenditures and contributions was set forth in *Buckley*. "[R]estriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The *Buckley* court explained that it was subjecting the Act's expenditure limitations to "the exacting scrutiny applicable to limitations on

core First Amendment rights of political expression." *Id.* at 44-45. By contrast, the Court wrote in *Buckley*, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Accordingly, contribution limits have come to be analyzed under a somewhat more deferential standard.

After drawing this distinction, the Court held that the danger of actual or perceived *quid pro quo* corruption that flows from a system of unregulated campaign contributions justified reasonable limits on contributions, but that the restrictions on candidate spending and independent expenditures could not be sustained by that interest or any of the other interests that the challenged statute purportedly advanced. Applying the exacting scrutiny that is applicable to government regulation of speech, 424 U.S. at 39, 44-45, the Court rejected the argument that expenditure limits were necessary, (1) to prevent corruption of candidates, or the appearance of corruption; (2) to reign in spiraling campaign costs; or (3) to "level the playing field." *Id.* at 39-57.

The Court's post-*Buckley* cases have adhered to the view that restrictions on candidate spending or independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and represent substantial, direct restraints on the quantity and diversity of political speech. For this reason, the Court's post-*Buckley* cases have consistently rejected attempts to regulate expenditures under various pretexts that have been asserted to allegedly preserve the integrity of the electoral process. See *Colorado I*, 518 U.S. at 615-19 (rejecting attempts to regulate political party expenditures to combat a substantial danger of corruption to the electoral system since lack of coordination between the party and candidate precluded the type of *quid pro quo* corruption thus far identified as the only justification sufficient to impose expenditure limits and despite purported danger of unlimited party spending); *National Conservative PAC*, 470 U.S. at 491-97 (political committee expenditures); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)

(striking down restriction on corporate expenditures to influence ballot measure).[5]

The panel opinion in this case departs from almost thirty years of Supreme Court precedent, and introduces an element of uncertainty into the regulation of campaign finance at a time when state and local governments are comprehensively re-examining the issue for the first time since *Buckley* was decided.

Even assuming that it is theoretically possible to justify some form of spending limits through the enactment of a law that is narrowly tailored to serve a compelling government interest, it is up to this Court to establish the constitutional boundaries of such regulation in an area that touches so directly on fundamental First Amendment freedoms.

The Second Circuit attempted to avoid the precedential import of *Buckley* by redefining the State's anti-corruption rationale in terms of public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. The court asserted that *Buckley* had not fully considered this issue or the subsidiary issue of whether an expenditure law could be justified by the State's alleged interest in reducing the time spent on fundraising.

In fact, *Buckley* speaks much more directly to these issues than the Second Circuit acknowledged. The *Buckley* Court categorically rejected the argument that the spending of money legally raised by candidates poses a risk of *quid pro quo* corruption. 424 U.S. at 55-56. For this reason, the Second Circuit expressed serious doubt whether the State's anti-corruption interest is sufficient *by itself*. App. 135a. Despite its reservations, the court relied on this interest anyway by linking it with the State's separate interest in freeing candidates from the demands of fundraising attributable to the drive for campaign funds. It is doubtful, however, that that interest is sufficient to satisfy *Buckley*, or even that it is distinct from the

[5] The only exception thus far upheld by the Court for regulation of political expenditures involved political expenditures by corporations and labor unions. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell, supra*.

broader interest rejected in *Buckley* of controlling the costs of campaigns. Addressing arguments very similar to those raised here, the Court held that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is not compelling or sufficient enough to justify restrictions on campaign spending. *Buckley*, 424 U.S. at 57.

> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for government restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. (footnote omitted). See also *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (rejecting attempt to shape views of political party in an effort to bring party more to the center).[6] If that rule of law is now to be changed, it can only be done by this Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).[7]

[6] The prediction that spending limits will necessarily reduce the amount of time that candidates spend raising money is misguided. The expenditure limits have been adopted in tandem with the lowest contribution limits in the country. The majority below recognized that such low contribution limits would actually require candidates to spend more time fundraising, thus in a circular way justifying the Act's low spending limits as well. App. 150a-151a. In his dissent from denial of rehearing en banc, Chief Judge Walker recognized that a statute cannot be justified "based on problems that the statute itself creates." App. 331a.

[7] The assertion that expenditure limits will spare candidates the burden of fundraising does not apply to candidates who spend their own money. Rather, the principal rationale for limiting their expenditures seems to be a desire to "level the playing field." *Buckley* rejected this interest as justification for

Even if the *new* form of corruption relied upon below is distinct from the interests considered in *Buckley*, the court below compounded its error by unnecessarily remanding the case to determine whether the expenditure limits adopted by the legislature were narrowly tailored to serve those interests. *Buckley* has already established that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. *Buckley*, 424 U.S. at 58-59. In reaching this conclusion, the Court considered a number of factors that apply equally in this case.

First, the government's interest was largely alleviated by the Act's contribution limits and disclosure requirements. *Id.* Vermont's contribution limits are the lowest in the country, and its disclosure laws are some of the strictest. The panel gives short shrift to this evidence and in effect concludes that the judgment made in *Buckley* about the efficacy of those less restrictive measures was wrong.

Second, *Buckley* specifically relied on data showing expenditure ceilings would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major party presidential candidates. *Id.* at 20 n. 21, 55 n. 62. The record in this case shows that the expenditure limits would have had at least as significant an impact in both legislative and statewide elections as the evidence established in *Buckley*. As emphasized in Judge Winter's dissent, the website for the Vermont Secretary of State shows very plainly that candidate expenditures have far exceeded the expenditure limits in the three state-wide elections that have been held since the law was first enacted. App. 235a-240a.[8] Petitioners do not

spending limits on the candidate's use of his or her own funds. 424 U.S. at 52-54.

[8] Although the district court enjoined enforcement of the expenditure limits, it adopted defendants' data showing how the limits would have effected previous elections in Vermont based on historical spending patterns. The court's finding focused only on average spending for legislative and statewide office. App. 235a-240a. The Court made no attempt to isolate or measure the impact of the limits on elections that were competitive or considered "in-play". App. 239a-240a. The cost of these elections deviates from the average considerably. In the last two gubernatorial elections in Vermont, the major party candidates reported expenditures in amounts that were double or almost triple Act 64's limits. App. 239a. Moreover, even a third party candidate for Governor exceeded the limits in the 2000 election. *Id.*

[9] Candidate spending is defined to include "anything of value," including a candidate's use of the family car or home phone, donated professional services, the value of favorable press coverage and the costs of complying with the law. App. 211a, 225a-226a.

believe that "effective advocacy" is or should be the governing standard for expenditure limits, but the expenditure limits adopted by Vermont and approved by the Second Circuit fail to reach even this minimal threshold for key competitive races.

The problem with Vermont's expenditure limits is exacerbated by the fact that the limits are adopted on a *per two-year cycle* basis. This approach fails to account for the cost of a contested primary, or worse, a candidate who spent up to his limit during the primary and who must face in the general election an opponent, especially an incumbent, who faced no primary opponent. Witnesses from both the Democratic and Republican parties testified that this provision may affect who runs in certain elections by creating incentives to avoid contested primaries. Finally, Vermont's limits have to be understood in the context of the broad definition of "expenditure" and the related expenditure provision contained in 17 V.S.A. § 2809(a)-(d).[9] The related expenditure provision not only counts third party expenditures that are *in fact* coordinated towards the candidate's expenditure ceiling, but also presumptively treats political party and political committee expenditures as contributions to the candidate and as candidate expenditures. App. 8a-9a. The presumption attaches if the expenditure benefits six or fewer candidates. Even though the candidate has no control over these expenditures, they count toward his or her spending ceiling. As such, the historical averages relied on by both the district court and the court of appeals grossly understate the true level of candidate "spending" as defined by Act 64. App. 233a-240a.

Above all else, the Court concluded in *Buckley* that "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on

behalf of his own candidacy" whether the source of his money is personal wealth or funds raised from legal contributions. *Buckley*, 424 U.S. at 54. The Court of Appeals' decision erroneously proceeds on the assumption that First Amendment protections for campaign speech have been watered down and that the judgments made in *Buckley* are no longer valid. Just the opposite is true. The Court's campaign finance jurisprudence on this issue has been remarkably constant and has unfailingly affirmed the holding in *Buckley*. The State is obviously dissatisfied with *Buckley*. Its quarrel is with this Court, however. Only this Court can provide the relief the State seeks.

II. The Second Circuit Decision Upholding Candidate Expenditure Limits and Upholding the Regulation of Independent Expenditures by Political Parties and Committees Is in Conflict with the Decisions of Other Courts of Appeals

A. The Circuit Conflict Involving Limits on Candidate Expenditures

Not surprisingly, the Second Circuit decision stands in direct conflict with recent decisions of the Sixth and Tenth Circuits. On the strength of the holding in *Buckley*, both courts categorically rejected the imposition of expenditure limits and the main arguments advanced by the State and adopted by panel below. See *Kruse*, 142 F.3d 907; *Homans*, 366 F.3d 900.

In *Kruse*, the court held that the erosion of public trust attributed to unlimited campaign spending cannot be severed as a 'new' form of corruption that the Supreme Court has not considered. *Kruse*, 142 F.3d at 916. The court held that any problems that flow from unlimited candidate spending are an outgrowth of the problems of actual or perceived corruption and the inequalities of private economic power rejected in *Buckley*, and therefore cannot provide separate justification for expenditure limits. *Id.* In contrast to the Second Circuit, the Sixth Circuit assumed that this Court had these considerations in mind when it observed, in *Buckley*, that "no governmental

interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by the ceiling on campaign expenditures." *Kruse*, 142 F.3d at 916.[10] *See Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (expenditure limits imposed on judicial candidates could not be justified by State's interest in reducing the influence of otherwise lawful campaign contributions on judicial decisions). *See also, New Hampshire Right to Life Comm. v. Gardner*, 99 F.3d 8, 10-19 (1st Cir. 1996) (rejecting argument that independent expenditure limits could be justified by corrosive effect of money on the electoral process).

The Sixth Circuit in *Kruse* also rejected the contention that expenditure limits are needed to reduce the amount of time candidates spend raising money, and relatedly, to achieve the broader objective of "combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending." 142 F.3d at 916. The Court reasoned that to the extent *Buckley* did not already foreclose the argument:

> The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns ... [B]ecause the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

Id. at 916-917.

The panel decision below also conflicts with the decision of the Tenth Circuit Court of Appeals in *Homans v. City of Albuquerque, supra*. In *Homans*, spending limits were defended on the grounds that they were necessary to deter

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[10] While not separately addressed by the Supreme Court, one of the interests specifically advanced by the government in *Buckley* was the "alienation from and disillusionment in the election process by this country's citizens." *Kruse*, 142 F.3d at 916 (quoting from the Court of Appeals decision in *Buckley v. Valeo*, 519 F.2d 821, 913 (D.C. Cir. 1975)).

corruption, including the circumvention of contribution limits, and to free candidates from the demands of raising unlimited campaign funds. The court rejected the argument that the constitutionality of spending limits remains an open question to be determined by the facts of each case. The court held that "under *Buckley*, such restrictions cannot be supported as a matter of law." *Homans*, 366 F.3d at 914. In addition, the Tenth Circuit held that "prevention of corruption ... was specifically rejected by *Buckley* as a sufficient reason to limit direct campaign spending," and that the proffered interest of relieving elected officials of the demands of fundraising was "neither new nor compelling, nor are the spending caps tailored narrowly to serve them." *Id.* at 914.[11]

B. The Circuit Conflict Involving the Regulation of Independent Expenditures by Political Parties and Committees

Not content to limit candidates' own spending, Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. 2809(d), expenditures by political parties or political committees that benefit six or fewer candidates are automatically treated as "related expenditures" and count toward the organization's contribution limits as well as the candidate's expenditure limit. App. 9a. The statutory presumption is not strictly conclusive and leaves open the possibility of showing that the expenditure was, in fact, *not* coordinated. Nevertheless, political organizations that spend as little as $200-$400 on completely independent expenditures act at their own peril if they spend (or contribute) an additional amount on behalf of a legislative or gubernatorial candidate.

Because of the constitutional difference between independent expenditures and "contributions," it is not

[11] Although Judge Tymkovich's opinion is styled as a concurrence, it was joined by Judge O'Brien and therefore constituted the majority opinion with regard to the substantive constitutional analysis of the spending limits at issue. *Homans*, 366 F.3d at 902, 914 n. 1.

constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions. *Colorado I*, *supra.* The panel below distinguished that decision because of the availability of an affirmative defense allowing for rebuttal. The court upheld the related expenditure provision because it serves to prevent avoidance of the contribution limits – even though it cited no evidence that spending by political parties and political committees has been used in this fashion in Vermont. App. 183a-184a. The holding directly conflicts with the decision reached by the Eight Circuit Court of Appeals. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963.

In *Williams* the court invalidated a disclosure statute that required candidates to file a statement within 72 hours disavowing any independent expenditure made on their behalf. If the candidate did nothing the expenditure was automatically presumed to be approved by candidate and treated as an expenditure by the candidate for purposes of disclosure. Relying on *Colorado I*, the court first observed that "simply calling an independent expenditure a 'coordinated expenditure,' or presuming such, cannot make it so." *Id.* at 967-68. The court then held that the fact that the candidate can disavow that the expenditure was coordinated or made without his knowledge does not cure the constitutional objection because an entirely independent expenditure is automatically presumed to be a coordinated expenditure. *Id.* at 967. The court held that the presumption "eliminat[es] the independent nature of the speech and thus diminish[es] its value." *Id.* In view of the provision's presumptive treatment of independent expenditures as coordinated, and absent any evidence that the statute is necessary to combat corruption, the court concluded that the statute was not narrowly tailored to serve that interest. *Id.* at 968.

The Vermont statute is significantly more restrictive than the disclosure statute considered in *Williams* because it places a direct restraint on speech by automatically counting independent expenditures as contributions and expenditures for purposes of the limits. The court's analysis below is limited to

its determination that the statute does little more than regulate coordinated expenditures and upholds it on the strength of this Court's decision in *Colorado II*. The panel does not even undertake the careful First Amendment analysis required to determine if the related expenditure provision is narrowly tailored to advance the State's interest.

The opinion acknowledges that "accused" candidates and political parties may be required to testify in an adversarial proceeding to rebut the presumption. App. 183a-184a. The court fails, however, to even discuss how the related expenditure provision burdens First Amendment rights or how the cost of defense would erode a candidate's available spending limit. App. 226a. The effect of the statutory presumption is that political organizations and candidates must act at their own peril when engaging in lawful campaign spending. A political party that independently sends out a mailing endorsing its candidate for Governor, and costing a modest $500, will have exceeded the allowable contribution limit and be completely foreclosed from making any additional expenditures or direct contributions. Moreover, both the party and the benefiting candidate are presumed to have committed a crime under Vermont law. The statute works to make all political party and political committee expenditures suspect in the eyes of prosecuting authorities and subject to scrutiny (and perhaps abuse) by overzealous authorities or opponents. The risk of prosecution "hovers over [candidates and political organizations] like the proverbial sword of Damocles'' and imposes a heavy burden on political speech. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 881 (1997). Moreover, the Act's presumption that the independent expenditures of political parties and committees are coordinated is by definition not narrowly tailored since the statute's purpose is already served adequately by the same statutory provision that properly treats *coordinated* expenditures as contributions. 17 V.S.A. § 2809(c). App. 8a. More importantly, the opportunity to rebut the presumption does not constitute the sort of narrow tailoring that would save an otherwise unconstitutional statute, particularly in the absence of any evidence of improper

coordination. *See, e.g., Reno v. American Civil Liberties Union,* 521 U.S. at 881.

Vermont is attempting to do indirectly what is clearly prohibited from doing directly – curtail expenditures made totally independently of the candidate and his campaign. The majority opinion brushes aside this claim and the related allegation that the law will "chill" political organizations from engaging in protected speech. Individuals and organizations wishing to engage in expenditures may be reluctant to do so knowing that if they cannot successfully rebut the presumption, they will have violated the state's campaign finance laws and be subject to criminal prosecution. When political organizations and candidates are challenged under section 2809, they will be required to spend their limited resources in court. *See Massachusetts Citizens for Life,* 479 U.S. 238. These resources, of course, are counted against the organization's contribution limits and the candidate's expenditure limits. Moreover, for all the reasons advanced in Judge Winter's dissenting opinion, the related expenditure provision is fraught with vagueness, uncertainty, and the potential for untold mischief. App. 223a-226a. In the final analysis, the failure to respond to these failings in the law ignores the important First Amendment freedoms that this statute jeopardizes.

III. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Campaign Contributions

The framework for evaluating contribution limits requires the State to demonstrate that the restriction is "closely drawn to match a sufficiently important interest." *Shrink*, 528 U.S. at 387-388. This standard requires two key factual determinations. First of all, a limit can be valid only if it is closely drawn to serve a compelling state interest in combating "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt." *Id.* at 389-395. Secondly, the limit must not be so low that it prevents candidates from

amassing the resources needed for effective advocacy. *Id.* at 397.

Unlike contribution limits that have been upheld elsewhere, Vermont's were adopted in combination with an overly zealous legislative attempt to impose mandatory spending limits on candidates. As a result, the contribution limits are established at levels that directly correspond to expenditure limits which themselves are unrealistically low. In an opinion dissenting from the denial of rehearing *en banc*, Chief Judge Walker characterizes the contribution limits as "laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them." App. at 330a-331a. Some candidates are limited to as little as $200 from any contributor for an entire two-year election cycle – even the candidate's political party, meaning that a contributor who gives her favorite candidate $200 in a hotly contested primary is prohibited from providing any new assistance to the candidate in the general election. Even gubernatorial candidates can accept only $400 every two years. Contributions from political parties are restricted still further as all the state, county, and town committees of a political party are treated as a single entity. Hence, the entire Republican, Democratic, or Libertarian Parties of Vermont, with all their local committees, may only give $400 each to their gubernatorial nominee.

The record does not disclose any evidence to justify Vermont's exceedingly low contribution limits. The State's evidence and the district court's findings are extremely thin, and miss the mark by failing to link the supposed problems with large contributions. While the State need not show money for vote chicanery, it must at least make a case arising from the broader interest in the "threat [of] politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. No such case was made here. The legislative findings and trial testimony relied upon by the State loudly bemoan the evils of large contributions and the public's suspicion of them, but very few examples are provided. Most incidents involved

contributions that were low enough to have been permitted by these new limits. Despite having compiled extensive contribution data covering three election cycles, the State never identified the phantom contributors allegedly poisoning the system with large contributions – much less established a pattern or practice of corrosive large contributions.

The record amply demonstrates that these limits would radically reduce the funding of political campaigns. By setting its limits so low and applying them so broadly, Vermont makes it difficult for many candidates to raise necessary finances. By treating political parties and PACs as if they were individual contributors, moreover, the limits trample the weightier associational interests at stake when restricting the rights of individuals who come together for a common purpose. Instead of reigning in the special interests and industry groups that the public is concerned with, Vermont has taken a sledge hammer to the problem that will choke off "clean" money from the very sources that pose little or no risk of corruption and of which the public is far less suspicious. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour infusion of cash in a close election where an additional mailing or media spot might make the difference. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

The panel opinion ignores this evidence and instead relies on the District Court findings that the reduced limits will not impede the ability of the "average" candidate to amass the funds necessary to finance his or her campaign. App. 169a-171a. As plaintiffs have emphasized throughout, the profile of the average candidate relied upon by the State and endorsed by the lower court includes the dozens of candidates who raised little money because they ran unopposed or faced nominal opposition. Relying on the contributions made to these candidates skews the average, and masks the severe impact upon the candidates who actually need to communicate with

their constituents. It is the competitive candidacies that are most affected by these limits, and these are the ones where a full debate of the issues is most critical. Each year, a handful of competitive elections determine the balance of power in the legislature.

Thus, while the limits may not effect all elections in all districts, it is hard to argue that the limits will not seriously impact candidates in statewide races and many House and Senate elections. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. The costs of television, radio and newspaper advertising have increased the expense of running an effective campaign and, Defendant's vision of Vermont politics -- that of "old fashioned", grassroots campaign methods -- may be enticing, but such vision cannot be legally imposed on all candidates. Vermont's new limits prevent candidates from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and undermine "the potential for robust and effective discussion of candidates and campaign issues . . . ." *Id.* at 29.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully Submitted,

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APPENDIX A

§ 2801. Definitions

As used in this chapter:

(1) "Candidate" means an individual who has taken affirmative action to become a candidate for state, county, local or legislative office in a primary, special, general or local election. An affirmative action shall include one or more of the following:

(A) accepting contributions or making expenditures totalling $500.00 or more; or

(B) filing the requisite petition for nomination under this title or being nominated by primary or caucus; or

(C) announcing that he seeks an elected position as a state, county or local officer or a position as representative or senator in the general assembly.

(2) "Contribution" means a payment, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid to a person for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates in any election, but shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate, political committee or political party. For purposes of this chapter, "contribution" shall not include a personal loan from a lending institution.

(3) "Expenditure" means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

(4) "Political committee" or "political action committee" means any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in

any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election or advocating a position on a public question, in any election or affecting the outcome of an election.

(5) "Political party" means a political party organized under chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party.

(6) "Single source" means an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party.

(7) "Election" means the procedure whereby the voters of this state or any of its political subdivisions select a person to be a candidate for public office or fill a public office, or to act on public questions including voting on constitutional amendments. Each primary, general, special, run-off or local election shall constitute a separate election.

(8) "Public question" means an issue that is before the voters for a binding decision.

(9) "Two-year general election cycle" means the 24-month period that begins the day after a general election.

(10) "Full name" means an individual's full first name, middle name or initial, if any, and full legal last name, making the identity of the person who made the contribution apparent by unambiguous reference. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj. Sess.), § 1; 1997, No. 64, § 5, eff. Nov. 4, 1998.)

§ 2802. Checking account; treasurer

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by check from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2803. Campaign reports; forms; filing

(a) The secretary of state shall prescribe and provide a uniform reporting form for all campaign finance reports. The reporting form shall be designed to show the following information:

(1) the full name, town of residence and mailing address of each contributor who contributes an amount in excess of $100.00, the date of the contribution, and the amount contributed;

(2) the total amount of all contributions of $100.00 or less and the total number of all such contributions;

(3) each expenditure listed by amount, date, to whom paid and for what purpose;

(4) the amount contributed or loaned by the candidate to his or her own campaign during the reporting period; and

(5) each debt or other obligation, listed by amount, date incurred, to whom owed and for what purpose, incurred during the reporting period.

(b) The form shall require the reporting of all contributions and expenditures accepted or spent during the reporting period and during the campaign to date and shall require full disclosure of the manner in which any indebtedness is discharged or forgiven. Contributions and expenditures for the reporting period and for the campaign to date also shall be totalled in an appropriate place on the form. The form shall contain a list of the required filing times so that the person filing may designate for which time

period the filing is made. Contributions and expenditures received or spent during the 48 hour period prior to the filing deadline shall be reported on the next report.

(c) The form described in this section shall contain language of certification of the truth of the statements and places for the signature of the candidate and his treasurer.

(d) All reports filed under this section shall be retained in an indexed file by the official with whom the report is filed and shall be subject to the examination of any person.

(e) Disclosure shall be limited to the information required by this section. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1985, No. 198 (Adj. Sess.), §§ 14, 15; 1987, No. 263 (Adj. Sess.), § 2; 1997, No. 64, § 11, eff. Nov. 4, 1998.)

§ 2804. Surplus campaign funds

(a) No member of a political committee which has surplus funds after all campaign debts have been paid shall convert the surplus to personal use.

(b) No candidate who has surplus funds after all campaign debts have been paid shall convert the surplus to personal use, other than to reduce personal campaign debts.

(c) The "final report" of a candidate shall indicate the amount of the surplus and how it has been or is to be liquidated. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2805. Limitations of contributions

(a) A candidate for state representative or local office shall not accept contributions totaling more than $200.00 from a single source, political committee or political party in any two-year general election cycle. A candidate for state senator or county office shall not accept contributions totaling more than $300.00 from a single source, political committee or political party in any two-year general election cycle. A candidate for the office of governor, lieutenant governor, secretary of state, state treasurer, auditor of

accounts, or attorney general shall not accept contributions totaling more than $400.00 from a single source, political committee or political party in any two-year general election cycle. A political committee, other than a political committee of a candidate, or a political party shall not accept contributions totaling more than $2,000.00 from a single source, political committee or political party in any two-year general election cycle.

(b) A single source, political committee or political party shall not contribute more to a candidate, political committee or political party than the candidate, political committee or political party is permitted to accept under subsection (a) of this section.

(c) A candidate, political party or political committee shall not accept, in any two-year general election cycle, more than 25 percent of total contributions from contributors who are not residents of the state of Vermont or from political committees or parties not organized in the state of Vermont.

(d) A candidate shall not accept a contribution in excess of $50.00 unless made by check.

(e) A candidate, political party or political committee shall not accept a contribution which is not directly from the contributor, but was transferred to the contributor by another person for the purpose of transferring the same to the candidate, or otherwise circumventing the provisions of this chapter.

(f) This section shall not be interpreted to limit the amount a candidate or his or her immediate family may contribute to his or her own campaign. For purposes of this subsection, "immediate family" means individuals related to the candidate in the first, second or third degree of consanguinity.

(g) The limitations on contributions established by this section shall not apply to contributions made for the purpose

of advocating a position on a public question, including a constitutional amendment.

(h) For purposes of this section, the term "candidate" includes the candidate's political committee. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj. Sess.), § 3, eff. Jan. 1, 1989; 1997, No. 64, § 6, eff. Nov. 4, 1998.)

§ 2805a. Campaign expenditure limitations; amounts

(a) The following campaign expenditure limitations shall apply to all candidates, for all primary, general and local elections, whether or not a candidate accepts Vermont campaign finance grants under subchapter 6 of this chapter, is financing his or her campaign from private contributions, or from the candidate's own resources or that of his or her immediate family.

(1) A candidate for governor shall limit campaign expenditures to no more than $300,000.00 in any two-year general election cycle.

(2) A candidate for lieutenant governor shall limit campaign expenditures to no more than $100,000.00 in any two-year general election cycle.

(3) A candidate for secretary of state, state treasurer, auditor of accounts or attorney general shall limit campaign expenditures to no more than $45,000.00 in any two-year general election cycle.

(4) A candidate for state senator or county office shall limit campaign expenditures to no more than $4,000.00 plus, in the case of state senator, an additional $2,500.00 for each additional seat in the senate district, in any two-year general election cycle.

(5) A candidate for state representative in a single-member district shall limit campaign expenditures to no more than $2,000.00, and in a two-member district to no more than $3,000.00, in any two-year general election cycle.

(b) Recognizing the jurisdiction of the Congress of the United States to enact expenditure limitations and campaign finance reforms for candidates for federal office, the general assembly of the state of Vermont expects candidates for the United States House of Representatives and Senate to observe the contribution and expenditure limitations that apply to candidates for the office of governor.

(c) If a candidate for the office of governor, lieutenant governor, secretary of state, state treasurer, auditor of accounts or attorney general is an incumbent of the office being sought, the candidate shall be permitted to expend only 85 percent of the amount allowed for that office under this section. If a candidate for the general assembly is an incumbent of the office being sought, the candidate shall be permitted to expend only 90 percent of the amount allowed for that office under this section.

(d) For purposes of this section, the term "candidate" includes the candidate's political committee. (Added 1997, No. 64, § 7, eff. Nov. 4, 1998.)

§ 2806. Penalties

(a) A person who knowingly and intentionally violates a provision of subchapters 2 through 4 of this chapter shall be fined not more than $1,000.00 or imprisoned not more than six months or both.

(b) A person who violates any provision of this chapter shall be subject to a civil penalty of up to $10,000.00 for each violation and shall refund the unspent balance of Vermont campaign finance grants received, if any, calculated as of the date of the violation.

(c) In addition to the other penalties herein provided, a state's attorney or the attorney general may institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation of this chapter. (Added 1981, No. 197 (Adj. Sess.), § 1; amended

1991, No. 156 (Adj. Sess.), § 3, eff. Jan. 1, 1993; 1997, No. 64, § 3.)

§ 2807. New campaign accounts

Candidates who choose to open a new campaign account for public-office may close out their former campaign by filing a final report with the secretary of state converting all debts and assets to the new campaign. This final report shall disclose all contributions and expenditures and the disposition of all debts and assets attributable to the former campaign as of the date of the filing of the final report. (Added 1987, No. 263 (Adj. Sess.), § 4.)

§ 2808. Preparation of list of campaign expenditures

Not later than five days after receipt of campaign finance reports under this chapter, the secretary of state shall prepare a list of the accumulated amount of expenditures reported by each candidate. (Added 1991, No. 156 (Adj. Sess.), § 2, eff. Jan. 1, 1993.)

§ 2809. Accountability for related expenditures

(a) A related campaign expenditure made on a candidate's behalf shall be considered a contribution to the candidate on whose behalf it was made.

(b) A related campaign expenditure made on a candidate's behalf shall be considered an expenditure by the candidate on whose behalf it was made. However, if the expenditure did not exceed $50.00, the expenditure shall not be considered an expenditure by the candidate on whose behalf it was made.

(c) For the purposes of this section, a "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee.

(d) An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates. An expenditure made by a political party or by a political committee that recruits or endorses candidates, that substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure made on a candidate's behalf. In addition, an expenditure shall not be considered a "related campaign expenditure made on the candidate's behalf" if all of the following apply:

(1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally.

(2) The expenditures were made only for refreshments and related supplies that were consumed at that event.

(3) The amount of the expenditures for the event was less than $100.00.

(e) A candidate may seek a determination that an expenditure is a related expenditure made on behalf of an opposing candidate by filing a petition with the superior court of the county in which either candidate resides. Within 24 hours of the filing of a petition, the court shall schedule the petition for hearing. Except as to cases the court considers of greater importance, proceedings before the superior court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way. The findings and determination of the court shall be prima facie evidence in any proceedings brought for violation of this chapter.

(f) The secretary of state may adopt rules necessary to administer the provisions of this section. (Added 1997, No. 64, § 8, eff. Nov. 4, 1998.)

§ 2810. Candidate information publication; on-line database

(a) For each two-year general election cycle, the secretary of state shall develop and continuously update a publicly accessible campaign database. The database shall contain at least the following information for all candidates for statewide and county office and for the general assembly: for candidates receiving public financing grants, the amount of each grant awarded; the information contained in campaign finance reports filed under this chapter; and all reports of mass media activity expenditures filed under section 2883 of this title. The database shall also include campaign finance reports filed by candidates for federal office. The information in the database, together with any biographical sketches and position statements submitted to the secretary of state by such candidates, shal. be made available to the public through the Vermont state home page on-line service, or through printed reports from the secretary in response to a public request within 14 days of the date of the request.

(b) Any candidate for statewide office and any candidate for federal office qualified to be on the ballot in this state may submit to the secretary of state a photograph, biographical sketch and position statement of a length and format specified by the secretary for the purposes of preparing a candidate information publication. Without making changes in the material presented, the secretary shall prepare a candidate information publication for statewide distribution prior to the general election, which includes the candidates' photographs, biographies and position statements, a brief explanation of the process used to obtain candidate submissions, and, with respect to offices for which public financing is available, an indication of which

candidates are receiving Vermont campaign finance grants and which candidates are not receiving Vermont campaign finance grants. The secretary shall prepare, publish and distribute the candidate information publication throughout the state no later than one week prior to the general election. The secretary shall also seek voluntary distribution of the candidate information publication in weekly and daily newspapers and other publications in the state. The candidate information publication shall also be available in large type, audiotape and Internet versions. (Added 1997, No. 64, § 9, eff. Nov. 4, 1998.)

§ 2810a. Administration

The secretary of state shall administer this chapter and shall perform all duties required under this chapter. The secretary may employ or contract for the services of persons necessary for performance of these duties. (Added 1997, No. 64, § 10.)

§ 2811. Campaign reports; candidates for state office, the general assembly, political committees and political parties

(a) Each candidate for state office, each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more, and each political committee and each political party required to register under section 2831 of this title shall file with the secretary of state campaign finance reports 40 days before the primary election and on the 25th of each month thereafter and continuing to the general election.

(b) At any time, but not later than 40 days following the general election, a candidate for state office and each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more shall file with the secretary of state a "final report" which lists a complete accounting of all contributions and expenditures, and disposition of surplus, and which shall constitute the termination of his or her campaign activities.

(c) A political committee or political party shall file a campaign finance report not later than 40 days following the general election. At any time, a political committee or a political party may file a "final report" which lists a complete accounting of all contributions and expenditures and which shall constitute the termination of its campaign activities.

(d) In odd-numbered years campaign finance reports shall be filed on July 15.

(e) Each candidate for the general assembly required to file campaign finance reports under this section shall also file such reports with the clerk of the candidate's respective senate or house district. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1997, No. 64, § 12, eff. Nov. 4, 1998.)

§ 2821. Campaign reports; county office candidates

(a) Each candidate for county office who has made expenditures or accepted contributions of $500.00 or more shall file campaign finance reports with the officer with whom his or her nomination papers are filed as follows:

(1) 10 days before the primary election;

(2) 10 days before the general election;

(3) further campaign reports shall be filed on the 15th day of July and annually thereafter or until all contributions and expenditures have been accounted for and any indebtedness and surplus have been eliminated.

(b) Within 40 days after the general election, each candidate for county office who has made expenditures or accepted contributions of $500.00 or more shall file a "final report" which lists a complete accounting of all contributions and expenditures, and disposition of surplus, and which shall constitute the termination of his or her campaign activities.

(c) Copies of reports filed under this section shall be forwarded by the officer to the secretary of state within five days of receipt. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj.

Sess.), §§ 5, 6; amended 1997, No. 64, § 13, eff. Nov. 4, 1998.)

§ 2822. Campaign reports; local candidates

Each candidate for local office who has made expenditures or accepted contributions of $500.00 or more shall file with the officer with whom his nomination papers are filed campaign finance reports ten days before and ten days after the local election. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2823. Nonfiling

The failure of a legislative, county or local candidate to file a campaign finance report shall be deemed an affirmative statement that the candidate has not accepted contributions or made expenditures of $500.00 or more. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2831. Campaign reports; political committees and parties

(a) Each political committee and each political party which has accepted contributions or made expenditures of $500.00 or more shall register with the secretary of state stating its full name and address, the name of its treasurer, and the name of the bank in which it maintains its campaign checking account within ten days of reaching the $500.00 threshold.

(b) A political committee or political party which has accepted contributions or made expenditures of $500.00, or more, for the purpose of influencing a local election or supporting or opposing one or more candidates in a local election shall, in addition to other filings required by this chapter, file campaign finance reports ten days before and ten days after the local election with the clerk of the municipality in which the election is held and with the secretary of state. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1985, No. 198

(Adj. Sess.), §§ 16, 17; 1997, No. 64, § 14, eff. Nov, 4, 1998.)

§ 2832. Filing with federal election commission

A political committee or political party may satisfy the filing requirements of this subchapter and subchapter 2 of this chapter by filing with the secretary of state a copy of that portion of the campaign finance reports applicable to candidates seeking election in this state which the committee or party has filed with the Federal Election Commission and by designating an in-state agent in the report. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1997, No. 64, § 15, eff. Nov. 4, 1998.)

§ 2851. Definitions

As used in this subchapter:

(1) "Affidavit" means the Vermont campaign finance affidavit required under section 2852 of this title.

(2) "General election period" means the period beginning the day after the primary election and ending the day of the general election.

(3) "Primary election period" means the period beginning the day after primary petitions must be filed under section 2356 of this title and ending the day of the primary election.

(4) "Vermont campaign finance qualification period" means the period beginning February 15 of each even-numbered year and ending on the date on which primary petitions must be filed under section 2356 of this title.

(5) "Secretary" means the secretary of state. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2852. Filing of Vermont campaign finance affidavit

(a) A candidate for the office of governor or lieutenant governor who intends to seek Vermont campaign finance grants from the Vermont campaign fund shall file a Vermont campaign finance affidavit on the date on or before which

primary petitions must be filed, whether the candidate seeks to enter a party primary or is an independent candidate.

(b) The secretary of state shall prepare a Vermont campaign finance affidavit form, informational materials on procedures and financial requirements and notification of the penalties for violation of this subchapter. The Vermont campaign finance affidavit shall set forth the conditions of receiving grants under this subchapter and provide space for the candidate to agree that he or she will abide by such conditions and all expenditure and contribution limitations, reporting requirements, and other provisions of this chapter. The affidavit shall also state the candidate's name, legal residence, business or occupation, address of business or occupation, party affiliation, if any, the office sought and whether the candidate intends to enter a party primary. The affidavit shall also contain a list of all the candidate's qualifying contributions together with the name and town of residence of the contributor and the date each contribution was made. The affidavit may further require affirmation of such other information as deemed necessary by the secretary for the administration of this subchapter. The affidavit shall be sworn and subscribed to by the candidate. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2853. Vermont campaign finance grants; conditions

(a) A person shall not be eligible for Vermont campaign finance grants if, during a two-year general election cycle, he or she becomes a candidate by accepting contributions totaling $500.00 or more or by making expenditures totaling $500.00 or more prior to February 15 of the general election year.

(b) A candidate who accepts Vermont campaign finance grants, shall:

(1) Not solicit, accept or expend any contributions except qualifying contributions, Vermont campaign finance grants and contributions authorized under section 2855 of this title,

which contributions may be solicited, accepted or expended only in accordance with the provisions of this subchapter.

(2) Deposit all qualifying contributions, Vermont campaign finance grants and any contributions accepted in accordance with the provisions of section 2855 of this title in a federally insured noninterest bearing checking account.

(3) Not later than 40 days after the general election, deposit in the Vermont campaign fund, after all permissible expenditures have been paid, the balance of any amounts remaining in the account established under subdivision (2) of this subsection. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2854. Qualifying contributions

(a) In order to qualify for Vermont campaign finance grants, a candidate for the office of governor or lieutenant governor must obtain during the Vermont campaign finance qualification period the following amount and number of qualifying contributions for the office being sought:

(1) For governor, a total amount of no less than $35,000.00 collected from no fewer than 1,500 qualified individual contributors making a contribution of no more than $50.00 each.

(2) For lieutenant governor, a total amount of no less than $17,500.00 collected from no fewer than 750 qualified individual contributors making a contribution of no more than $50.00 each.

(b) No candidate may accept more than one qualifying contribution from the same contributor and no contributor may make more than one qualifying contribution to the same candidate in any Vermont campaign finance qualification period. For the purpose of this section, a qualified individual contributor means an individual who is registered to vote in Vermont. No more than 25 percent of the total number of qualified individual contributors may be residents of the same county.

(c) Each qualifying contribution must indicate the name and town of residence of the contributor, the date received, and be acknowledged by the signature of the contributor.

(d) A candidate may retain and expend qualifying contributions obtained under this section. A candidate may expend the qualifying contributions for the purpose of obtaining additional qualifying contributions and may expend the remaining qualifying contributions during the primary and general election periods. Amounts expended under this subsection shall be considered expenditures for purposes of this chapter. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2855. Vermont campaign finance grants; amounts; timing

(a) To the extent funds are available, the secretary of state shall make grants from the Vermont campaign fund in separate grants for the primary and general election periods to candidates who have qualified for Vermont campaign finance grants under this subchapter.

(b) Whether a candidate has entered a primary or is an independent candidate, Vermont campaign finance grants shall be in the following amounts:

(1) For governor, $75,000.00 in a primary election period and $225,000.00 in a general election period, provided that the grant for a primary election period shall be reduced by an amount equal to the candidate's qualifying contributions.

(2) For lieutenant governor, $25,000.00 in a primary election period and $75,000.00 in a general election period, provided that the grant for a primary election period shall be reduced by an amount equal to the candidate's qualifying contributions.

(3) A candidate who is an incumbent of the office being sought shall be entitled to receive a grant in an amount equal

to 85 percent of the amount listed in subdivision (1) or (2) of this subsection.

(c) In an uncontested general election and in the case of a candidate who enters a primary election and is unsuccessful in that election, an otherwise eligible candidate shall not be eligible for a general election period grant. However, such candidate may solicit and accept contributions and make expenditures as follows: contributions shall be subject to the limitations of section 2805 of this title and expenditures shall be limited to an amount equal to the amount of the grant set forth in subsection (b) of this section for the general election for that office.

(d) Grants awarded in a primary election period, but not expended by the candidate in the primary election period, may be expended by the candidate in the general election period.

(e) If the Vermont campaign fund contains insufficient revenues to provide Vermont campaign finance grants to all candidates under this section, the available funds shall be distributed proportionately among all qualifying candidates. If grants are reduced under this subsection, a candidate may solicit and accept additional contributions equal to the amount of the difference between the amount of the Vermont campaign finance grants authorized and the amount received under this section. Additional contributions authorized under this subsection shall be governed by the provisions of sections 2805 and 2853 of this title.

(f) Vermont campaign finance grants for a primary election period shall be paid to qualifying candidates within the first ten business days of the primary election period. Vermont campaign finance grants for a general election period shall be paid to qualifying candidates during the first ten business days of the general election period. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2856. Vermont campaign fund

(a) A Vermont campaign fund is created for distribution of Vermont campaign finance grants to candidates for the offices of governor and lieutenant governor. The fund shall be administered by the state treasurer, and payments shall be made under warrants issued by the secretary of state.

(b) The fund shall consist of revenues from the following sources:

(1) Any amounts required to be deposited in the fund under section 2853 of this title.

(2) All penalties and fines levied for violations of this chapter.

(3) Forty percent of the amounts paid as annual report fees by domestic corporations under subdivision 1.22(a)(17) of Title 11A and 33 percent of the amounts paid as annual report fees by foreign corporations under subdivision 1.22(a)(16) of Title 11A.

(4) All amounts collected from the tax on lobbying expenditures imposed under 2 V.S.A. § 264a.

(5) All amounts collected under section 5862c of Title 32, the Vermont campaign fund add-on.

(6) Any gifts received by the fund.

(7) Any amounts appropriated to the Vermont campaign fund by act of the general assembly.

(c) All principal and interest remaining in the fund at the close of any fiscal year shall not revert but shall remain in the fund for use in succeeding fiscal years. (Added 1997, No. 64, § 2, eff. Jan. 1, 1998.)

§ 2881. Definitions

As used in this subchapter, "political advertisement" means any communication, including communications published in any newspaper or periodical or broadcast on radio, television or over any public address system, placed on any billboards, outdoor facilities, buttons or printed material attached to

motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers or other circulars, or in any direct mailing, which expressly or implicitly advocates the success or defeat of a candidate. (Added 1997, No. 64, § 4.)

§ 2882. Identification

All political advertisements shall contain the name and address of the person who paid for the advertisement. The advertisement shall clearly designate the name of the candidate, party or political committee by or on whose behalf the same is published or broadcast. In the case of printed or written matter, the name and address shall be printed or written large enough to be clearly legible, except that this shall not apply to buttons or any written or printed matter attached to or displayed on any motor vehicle. (Added 1997, No. 64, § 4.)

§ 2883. Notice of expenditure

(a) For purposes of this section, "mass media activities" includes television commercials, radio commercials, mass mailings, literature drops and central telephone banks which include the name or likeness of a candidate for office.

(b) In addition to any other reports required to be filed under this chapter, a person who makes expenditures totaling $500.00 or more for mass media activities within 30 days of a primary or general election shall report such expenditures to the secretary of state, and to the candidate whose name or likeness is included in the activity, within 24 hours of making the expenditure. The report shall identify the person who made the expenditure with the name of the candidate involved in the activity and any other information relating to the expenditure that is required to be disclosed under the provisions of subsections (a) and (b) of section 2803 of this title. (Added 1997, No. 64, § 4.)

§§ 2841, 2842. Repealed. 1997, No. 64, § 20, eff. Nov. 4, 1998.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MARCELLA LANDELL, et al., *Plaintiffs*,
NEIL RANDALL, et al., *Plaintiffs*,
and VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants*,
and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al., *Defendant-Intervenors*

Docket No, 2:99-cv-146

ORDER AND OPINION

This is a constitutional challenge to the 1997 Vermont Campaign Finance Reform Act ("Act 64"), codified at Vt. Stat. Ann. tit. 17, Chapter 59 §§ 2801-2883. Plaintiffs seek declaratory and injunctive relief under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the First and Fourteenth Amendments of the United States Constitution. U.S.C.A. Const. Amends. 1 and 14. Plaintiffs argue that certain provisions of Act 64 violate their First Amendment free speech and association rights and do not serve compelling state interests. The challenged provisions of Act 64 are as follows:

Section 2801(2) defines "contribution" as "a payment, distribution, advance, deposit, loan, or gift of money or anything of value, paid or promised to be paid to a

person for the purpose of influencing an election." Vt. Stat. Ann. tit. 17, 2801(1).

Section 2801(5) defines "political party" as "a political party organized under chapter 45[1] of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, § 2801(5). The Secretary of State's Office has interpreted Section 2801(5), in conjunction with chapter 45, to mean that town, county, and state committees are a single entity for the purposes of Act 64's campaign contribution limits.[2]

Sections 2805(a) and (b) limit contributions to candidates for Vermont office in a two-year election cycle to $200 for state representative, $300 for state senator, and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general. Contributions from a single source, political party, or political committee to political committees or political parties are limited to $2000. Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b).

Section 2805(c) limits out-of-state contributions to 25% of a candidate's total contributions. Vt. Stat. Ann. tit. 17, § 2805(c).

Section 2805(f) states that the individual contribution limits do not apply to the candidate herself or to her immediate family. Immediate family is defined as

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[1] Chapter 45 (Political Parties), Vt. Stat. Ann. Tit. 17, §§2301 through 2320, sets forth the rules for creating and operating town, county, and state political parties.

[2] Letter of David Grayck, Deputy Secretary of State, May 18, 1999.

"individuals related to the candidate in the first, second or third degree of consanguinity." Vt. Stat. Ann. tit. 17, 2805(f).

Section 2805a(a) limits candidate expenditures in any given two-year election cycle to $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, attorney general, treasurer, and auditor; $4,000 for state senator plus $2,500 for each additional seat in the relevant jurisdiction; and $2,000 for state representative in a single-member district and $3,000 for state representative in two-member districts. Vt. Stat. Ann. tit. 17, § 2805a(a).

Sections 2809(a) and (b) provide that related campaign expenditures made on a candidate's behalf shall be considered a contribution to the candidate and, if the related expenditure is over $50, it will also count as an expenditure by that candidate. Vt. Stat. Ann. tit. 17, §§ 2809(a) and (b).

Section 2809(c) states that an expenditure made by a third-party individual is considered a "related expenditure" made on behalf of a candidate or group of candidates if it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates," and is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c).

Section 2809(d) states that an expenditure made by a political party or by a political committee that primarily benefits six or fewer candidates who are associated with the party or committee triggers a presumption that it is a related expenditure. Vt. Stat. Ann. tit. 17, § 2809(d). The Administrative Rule promulgated by the Secretary of State pursuant to the authority granted in Section 2809(f) states that the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate. Vermont Secretary of State, Administrative Rule 2000-1(3)(d).

This case results from the consolidation of three separate civil actions: On May 18, 1999, Plaintiffs Marcella Landell, Donald Brunelle, and the Vermont Right to Life Committee, Inc., Political Committee sued Vermont Attorney General William H. Sorrell and Vermont's 14 States Attorneys. Plaintiffs alleged that Act 64 violated their First Amendment freedoms of speech and association (99-CV-146, Paper 1) (hereinafter "*Landell*"). On August 13, 1999, Plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey Nelson, John Patch, and the Vermont Libertarian Party brought essentially the same suit (99-CV-234, Paper 1) (hereinafter "*Randall*."). On October 25, 1999 this case was consolidated with *Landell* (99-CV-234, Paper 13). On February 15, 2000, Plaintiff Vermont Republican State Committee sued on similar grounds, but also raised a challenge to Act 64's application to political parties and committees (00-CV-57, Paper 1) (hereinafter "*VRSC*"). On March 21, 2000 the case was consolidated with *Landell* (Paper 28).

The Vermont Public Interest Research Group, The League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorello, Marion Gray, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, Maria Thompson (collectively "Defendant-Intervenors") successfully moved to intervene in all three of the above cases. Court Orders granting motions: *Landell*, September 27, 1999 (Paper 27); *Randall*, October 25, 1999 (Paper 13); *VRSC*, March 21, 2000 (Paper 28).

For reasons set forth below, this Court finds Act 64 constitutional in part and unconstitutional in part. Specifically, the Court rules as follows:

1) Act 64's contribution limits, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), as they pertain to contributions from

individuals, survive the test imposed upon such limits by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and are therefore constitutional.

2) Act 64's expenditure limits, Vt. Stat. Ann. tit. 17, §2805a(a), although supported by numerous important government interests such as minimizing the reality and appearance of corruption, stemming the manipulative practice of bundling, increasing candidate-voter contact, and inspiring participation in the electoral process, nevertheless are an unprecedented and impermissible extension of *Buckley*. The limits are unconstitutional.

3) Act 64's 25% limit on out-of-state funds, Vt. Stat. Ann. tit. 17, §2805(c), violates candidates' and contributors' First Amendment rights of free speech and association, and is therefore unconstitutional.

4) Act 64's $2000 limit on contributions to political parties, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), is constitutional. However, the limit on contributions from political parties to candidates, codified at same, while not per se unconstitutional, is unconstitutionally low. Additionally, Act 64'a definition of state and local parties as one entity pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5), and 2301 through 2320, and the May 18, 1999 letter from the Deputy Secretary of State, is constitutional.

5) Act 64's $2,000 limit on contributions to political committees, and its various limits on contributions by political committees to candidates, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), is constitutional.

6) Act 64's regulation of related expenditures, Vt. Stat. Ann. tit. 17, §2809(a)-(c), is constitutional as it relates to candidate contributions, but unconstitutional as it relates to candidate expenditures. Additionally, Section 2809(d)'s establishment of a rebuttable presumption that an expenditure by a political party or political committee is

related if it benefits six or fewer candidates, as clarified by the Secretary of State, is constitutional.

I. FACTUAL BACKGROUND

It should be noted at the outset of this section that the constitutionality of some provisions of Act 64 depends heavily on facts, while the constitutionality of others does not. The constitutionality of those sections that do hinge on facts depends in large part on whether the legislature was correct in perceiving that there was public concern about corruption in campaign financing, and whether the legislature's responses - i.e., the provisions of the Act - were properly tailored to address that perceived concern. As to the former criterion, the quality and quantity of evidence considered by the legislature, as well as the atmosphere of public concern leading to the Act's creation, are of central importance to this Court's rulings. Therefore, a substantial amount of background concerning the history of campaign finance regulation in Vermont, and the debate at the time of the passage of Act 64, is included in the facts section below.

A. The History of Campaign Finance Regulation in Vermont.

Efforts to regulate campaign finance in Vermont are certainly not new; nor is public concern about the issue. Over the last nine decades the Vermont Legislature has responded numerous times to public concern about the inappropriate influence of money in politics by passing laws limiting contributions and expenditures, as well as compelling

disclosure of campaign finances. Pre-*Buckley* laws to that effect were passed in 1916,[3] 1961,[4] and 1971.[5]

In 1976 the Supreme Court decided its landmark political speech case *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). The Court upheld limits on large contributions as necessary to further the compelling state purpose of preventing actual or perceived quid pro quo corruption in electoral politics, but struck down the spending limits as impermissible direct restraints on protected speech. As a result of *Buckley*, Vermont repealed its spending limits but maintained its contribution limits. 1975 Vt. Laws (Adj. Sess.) 188.

By the time the legislature prepared to revise the law in 1997 the limits on contributions to candidates varied according to the type of contributor. Individuals, corporations, and labor unions were limited to contributing

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[3] After two statewide referenda votes, the Vermont Legislature adopted direct primary elections. The law also included a corrupt practices act that mandated public disclosure after the primary of candidate expenditures, including expenditures on the candidate's behalf. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.) 4, §1

[4] Vermont adopted limits on campaign spending in primaries. 1961 Vt. Laws 178. Primary elections were of the utmost importance in the Republican-controlled state. The law limited spending to $7,500 for every candidate for state office. It prohibited outside contributions toward the cost of media advertising without the candidate's consent, and provided that any such contributions would count toward the candidate's spending limit.

[5] Spending limits were increased and applied to the general election as well. 1971 Vt. Laws 259. These limits were supplemented with contribution limits of $1000 "from a single source, except a contribution from a political party." Contributions from political parties remained unlimited, but there was a $1000 limit on contributions to parties.

$1,000 to a candidate in any election. Political committees were limited to contributing $3,000 to a candidate in any election. Political committees were defined as groups "not including a political party" that received contributions or made expenditures "for the purpose of supporting or opposing one or more candidates or affecting the outcome of an election." Former Vt. Stat. Ann. tit. 17, §2801(4). These same limits applied to contributions to political committees. Political parties were not subject to any limits on making or receiving contributions.

From 1993 to 1998 there existed a rule by which candidates could voluntarily sign an affidavit to limit spending to the amounts that were in place pre-*Buckley*. Former Vt. Stat. Ann. tit. 17, §§ 2841-2842. With each election cycle, however, adherence to the limits plummeted, from 85% to 90% adherence the first year, to under 20% the second year, then quickly to less than 10% adherence. In 1998, no candidates for statewide office signed the affidavit.

B. Publicity Leading Up To the Passage of Act 64.

Throughout the 1990"s there was a well recognized mounting concern about the corrupting effect of money in politics. Public officials recognized the problem and were calling for change. In 1991, Vermont's Secretary of State, Republican James Douglas spoke out in favor of stronger campaign finance regulation, noting that the need to raise large amounts of money for campaigns had heightened public suspicion of quid pro quo deals being struck between big money contributors and candidates. In 1997 Governor Howard Dean said in an address to the Vermont General Assembly, "money does buy access, and we're kidding ourselves and Vermonters if we deny it." Dean's comment, admirably candid, accelerated public discussion of the matter around the state.

Dozens of newspaper articles reflected the high level of citizen concern over the extent of money's influence over politics. While much of the coverage is anecdotal and thus is not persuasive evidence of actual corruption, it does nevertheless demonstrate the attention these issues received in Vermont and conveys the type of pressure that legislators must have felt to react. Such media coverage is therefore pertinent to understanding the decisions of the General Assembly. Papers reported on:

- State politicians' concern with the influence of money on Vermont politics: Senator Jeb Spaulding reportedly stated, "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and passage or failure of bills around here."[6] Senate President Pro Tem Peter Shumlin allegedly opined, "[t]here's no question (money) buys access to the system. In my view, it adversely influences a citizen legislature and elections for that matter."[7]
- The apparent coerciveness of specific contributions: When slate companies contributed to legislators on a study panel considering environmental regulation of the slate industry, one columnist commented, "it's hard to top this for blindness to appearances and propriety."[8] Regarding donations from tobacco companies, one commentator noted that "it's disturbing that Republican lawmakers, armed with

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[6] Christopher Graff, Money Chances Opinions, Burlington Free Press, April 27, 1997, at 6E.

[7] Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, Rutland Herald, Tuesday, April 8, 1997, at _____.

[8] John S. Rosenberg, *Dishonor Roll*, Vermont Magazine, Jan, Feb. 1995, at 21.

$25,450 in donations from tobacco giant Philip Morris, weakened an anti-smoking bill in the final hours of the 1997 session."[9] Reports also described allegations that Governor Dean vetoed a pharmacy bill after collecting $6,000 in campaign contributions from drug companies.[10] State Treasurer Paul W. Ruse was "criticized for financing his campaign with contributions from Wall Street firms with which the state does business."[11] Another article stated that "Ruse even appeared in a magazine advertisement for an investment firm."[12]

- The influence of out-of-state donations: "Outside money is one of Howard Dean's specialties. Of the $312,290 the governor raised for his 1996 election, 65 percent came from out-of-state contributors: labor unions, Washington lawyer-lobbyists, the health care industry, to name a few of the special interests."[13] For the 1994 election 'Dean, for example, received more money from major pharmaceutical manufacturers during the reporting period ($11,000) than he did from people and companies located in Burlington

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[9] Editorial, *Democratic Process Relies On Reform*, Burlington Free Press, October 6, 1997, at 6A.

[10] Bryan Pfeiffer, *Dean Angry About Pharmacy Veto Criticism, News Story*, Rutland Herald, June 16, 1994, at 11.

[11] Chris Graf, *Treasurer Won't Run: Surprise Intended to Thwart Auditor*, Burlington Free Press, July 20, 1994, at 1B.

[12] Editorial, *With Ruse Stepping Out*, Amestoy Must Step In, Burlington Free Press, July 20, 1994, at 6A.

[13] Bryan Pfeiffer, *Some Big Donors To Vt. Democrats Lacked State Ties*, Rutland Herald, May 4, 1997, at 1.

($10,460)."[14] One editorial said, "it's no mystery why out-of-state contributors pumped hundreds of thousands of dollars into Vermont campaigns. . . . They're trying to buy influence. But the cost is public trust."[15]

- The Vermont Attorney General's probe into the state Democratic Party's fundraising practices during the 1996 elections: The investigation centered on "whether some of the . . . campaigns violated Vermont law by failing to report big expenditures" by the state party and "whether those expenditures threw some of the candidates over the limits they had voluntarily agreed to impose on themselves."[16]
- The large amount of special interest money flowing to candidates in the 1996 elections: An editorial observed that PAC money dilutes the influence of Vermont voters: "[n]o doubt the phones are ringing for these PACs and political committees as they buy access. But what about the Fairfield dairy farmer . . . who can't write the big checks?"[17]

C. Legislative Hearings on Act 64.

In drafting Act 64, the various committees that considered the Act conducted more than 65 hearings at which more than 145 witnesses testified. Much of the

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[14] Bryan Pfeiffer, *Governor Doesn't Like the System, But He's Good at It*, Rutland Herald, August 25, 1994, at 1.

[15] Editorial, *No Sale*, Burlington Free Press, November 9, 1996, at 10A.

[16] David Gram, *Democratic Senate Fund Raising Probed*, Burlington Free Press, Tuesday, April 29, 1997, at 1B.

[17] Editorial, *Paying for Power*, Burlington Free Press, October 17, 1996, at 12A.

testimony heard was anecdote and personal opinion. Few witnesses, if any, testified against the bill. Among the evidence considered by the legislature were the following:

- Campaign finance summaries for numerous races including various Senate, House, and statewide races from 1978 through 1996.
- Evidence concerning spending and contribution patterns in Vermont's past elections.
- Testimony and data on the cost of campaigning, including cost of travel, staff, materials, mailings, phone calls, TV and radio ads.
- Testimony on manipulative financing practices such as bundling, through which special interests directed concentrated donations to candidates.
- Testimony concerning the pressures to raise funds: Senator Peter Shumlin testified that the time he spent raising funds prior to the 1996 elections "was one of the most distasteful things that I've had to do in public service."[18]
- Data on former campaign finance laws in Vermont and their efficacy. In particular, the legislature considered the dwindling adherence to voluntary spending limits in the 90's.
- Citizen polls concerning what constitutes an excessively large and/or suspicious donation. According to a 1995 Vermonter Poll, 69% of the respondents agreed that "A $100 limit on private donations will help make government more responsive to the needs of all people."
- Testimony about how particular bills were pushed or killed in committee based in part on the need of some

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[18] Senate Committee on Government Operations Hearing on Campaign Finance, February 4, 1997.

powerful legislators to act in accordance with the wishes of big donors.

- Testimony about the constitutionally valid contribution limits set in Maine.

D. The Process by which Act 64 Became Law.

During the 1997 Legislative Session, three separate bills dealing with campaign finance reform were introduced in the Assembly. Each bill enjoyed widespread bipartisan support.

S.69, "An Act Relating to Public Financing of Campaigns and Limitations on Expenditures," was co-sponsored by 20 senators including the Senate's Republican Assistant Minority Leader, and the President Pro Tem of the Senate. S.I37, 'An Act Relating to the Regulation of Independent Expenditure in Political Campaigns," was also introduced in the Senate by Republicans and Democrats together. Of the 30 members of the Senate, 25 sponsored at least one campaign finance reform bill during the 1997 session. H.28, "An Act Relating to Public Financing of Election Campaign[illegible]" was co-sponsored by Representatives Karen Kitzmiller (D) and Marion Milne (R) in the House. After analysis and consolidation of these three bills, H.28 became the vehicle through which the campaign reform provisions were enacted.

Speaking in support of the passage of H.28, Representative Milne noted that H.28 was supported by Governor Howard Dean (D), Speaker of the House Michael Obuchowski (D), past and present Attorneys General Jeffrey Amestoy (R) (now Chief Justice of the Vermont Supreme Court) and William Sorrell (D), and Secretary of State James Milne (R).

Support was strongly bipartisan for the June 12, 1997 Joint Conference Committee Report on H.28; the House

adopted the Report 121 to 17, with 37 House Republicans voting for it. The Senate adopted the Report by a vote of 20 to 9, with four Republican Senators voting in favor. On June 26, 1997 Governor Howard Dean signed H.28 into law as Act 64.

E. Official Legislative Findings and Intent Supporting Act 64.

After concluding its research and deliberation of campaign finance in Vermont, the General Assembly published extensive findings to support Act 64. The General Assembly found, in relevant part, that:

- Elections were becoming too expensive, and as a result many Vermonters were financially unable to seek election to public office. Furthermore, candidates for statewide office were spending inordinate amounts of time raising campaign funds. Finding (a)(1).
- Some candidates and elected officials respond to contributors who make large contributions in preference to those who make small ones. Finding (a) (2).
- Contributions larger than the amounts specified in this act are considered to be large contributions. Finding (a)(3).
- Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased. Finding (a) (4).
- Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small-group contact between candidates and the electorate and will encourage the personal involvement of a large number of

citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues. Finding (a) (8).

- Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in. the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens. Finding (a)(9).
- Citizen interest, participation and confidence in the electoral process, is lessened by excessively long and expensive campaigns. Finding (a)(10).
- Campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of such money are expended, particularly during the final days of a campaign. Finding (a)(13).
- Act 64 was necessary in order to implement Article 8 of Chapter I of the Vermont Constitution which declares "[t]hat all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." Finding (b).

F. Evidence At Trial

A ten day bench trial took place between May 8, 2000 and June 2, 2000 to gather facts in this matter. The Court has separated findings from that trial into two principal categories below: the state's proffered justifications for enacting the law, and the likely effect the law will have on political campaigns in Vermont.

1. Evidence of Compelling Governmental Interests

Supporting Act 64

Evidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics and that voter apathy is on the rise. Furthermore, it appears they have reason to feel that way. The record suggested that large contributors often have an undue influence over the legislative agenda, and that the need to solicit money from large donors at times turns legislators away from their official duties. Evidence supporting these conclusions came from both Plaintiffs and Defendants in the form of public perception, legislator perception, and expert opinion.

a. Erosion of Public Confidence.

Large contributions to candidates have undermined public confidence in Vermont's political system. On behalf of Defendants, Senator Elizabeth Ready (D), as well as Progressive gubernatorial candidate Anthony Pollina, testified at length to their observations of the waning interest of the public in participating in political and electoral matters. They based their opinions both on personal experience with voters and what they perceived to be public response to media coverage of finance controversies such as the tobacco, slate quarry, and pharmaceutical incidents discussed above.

Plaintiffs' witnesses likewise acknowledged the deterioration of public confidence. Gubernatorial candidate William Meub (R) testified that unlimited contributions have given rise to a perception of impropriety, that voters have become cynical, and that in Vermont there was, in his opinion, a general distrust of elected officials. Former Representative Steve Howard (D) testified that in order to restore public confidence in campaign funding, he had

proposed to the Democratic Party that it refuse donations from corporations and lobbyists. Plaintiffs John Patch and Neill Randall also agreed that in the opinion of Vermont voters large contributions raise the appearance of corruption.

The record also demonstrates that the public feels that Vermont's major political parties are heavily influenced, if not controlled, by a few large donors. In the most recent election cycle, political parties in Vermont received substantial amounts of money from sources contributing over $2,000. These contributions came from a small number of donors, yet constituted significant portions of the parties' revenue. In 1998, the Vermont Democratic Party received over $520,000, amounting to 66% of its revenue from just 43 contributors. The Vermont Republican Party received over $300,000, more than 46% of its revenue, from 39 donors.

Statistical evidence supplied by experts buttressed this testimony about deteriorating public confidence. Pollster and analyst Celinda Lake found that 74% of Vermont voters feel that ordinary voters do not have enough influence over politics and government in Vermont; 71% believe that corporations have too much influence; and 70% believe that wealthy individuals have too much influence.

b. Actual and Perceived Influence of Large Contributions on Legislators.

There is reason to believe that large campaign contributions have, at times, had an improper influence on Vermont legislators themselves. Senator Cheryl Rivers testified that in her experience, consideration of large donor concerns frequently shapes the legislative agenda in Montpelier and often determines whether a bill will get enough support from Senate leadership and committee members to move forward. Senator Rivers further testified that the pressure for parties to raise money makes it

increasingly difficult to pursue legislative initiatives contrary to the wishes of interest groups that give large contributions to the state party. As part of a Democratic leadership team, Rivers herself had been asked, contrary to her wishes, to solicit potential donors. She was assigned to call companies such as Electronic Data Systems ("EDS"), a company that is not located in her district and that she would have no reason to contact apart from the need for donations to the party. Senator Rivers insists such practices raise legitimate concerns about undue influence over the legislative agenda.

Expert testimony confirmed that large campaign contributions create the appearance of corruption to the public and affect legislators' voting behavior. Professor Thomas Stratmann testified, based on his own empirical studies, that there is strong evidence that campaign contributions affect legislator behavior. See, e.g., Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes.* (Defendants' Exhibit xx-1, location of publication unclear from exhibit). Plaintiffs' expert Dr. John Lott conceded in a letter to Plaintiffs' counsel summarizing his opinion of Act 64 that "[t]he more favors government has to give out, the more resources that people will spend to obtain those favors." Plaintiffs' Exhibit I, at 3.

As a result of the legislature's vulnerability to the demands of large contributors, the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters.

c. Public Suspicion About Out-Of-State Money.

Large contributions from out-of-state donors have raised suspicions of undue influence in the Vermont public. Plaintiff John Patch testified that a large contribution from an

out-of-state corporation could raise suspicions of attempted influence. Similarly, Plaintiff Neil Randall testified that if all of his campaign contributions were to come from out of state it might raise questions about his loyalties. Plaintiff Donald Brunelle stated that he would not want to solicit contributions from outside Vermont. "I would not personally believe that's where I want to get my contributions from. I don't want to be a -- a state Senator for California for example." He stated that if he received out-of-state contributions, he would feel like he represented those contributors, and that he had to serve their interests.

By and large, however, the specific out-of-state contributions which Defendants presented during the trial as troubling to the public, and those which were portrayed as suspicious in the media, were also large contributions, and often came from PACs. No evidence was offered that specifically showed how the "out-of-state" factor was what in fact led to actual or perceived corruption. There was also no evidence at trial to suggest that contributions from out-of-state sources were any more or less corrupting than those from in-state sources. Non-Vermonters such as second homeowners and those interested in regional matters such as the Northeast Dairy Compact may have legitimate interests in Vermont politics and policy.

2. Evidence Concerning the Effect Act 64 Will Have on Campaigns - Narrow Tailoring

a. Contribution Limits.

1. Statistics. Statistics show that Act 64's contribution limits would have very little effect on typical contribution patterns in Vermont. Approximately 88% to 96% of the campaign contributions to recent House races were under $200. Approximately 95% of the campaign

contributions to the 1994 and 1996 Senate races would have been unaffected by the new limits since they did not exceed $300. Even in the more heavily funded 1998 race, more than 82% of contributions would have been unaffected. More than 90% of the campaign contributions to the statewide candidates would have been unaffected by the new limits. Not all statewide candidates received contributions over the $400 limit. *See generally*, Expert Report of Anthony Gierzynski, Defendants' Exhibit U. Gierzynski testified that the shortfall in fundraising reflected in these statistics could be made up for by finding additional sources.

2. Effective campaigning. A great deal of the testimony at trial focused on the question of whether candidates would be able to wage effective campaigns under the new contribution limits. Although Plaintiffs' and Defendants' witnesses at times offered completely different opinions on this point, the more credible evidence shows that such campaigns would indeed be possible.[19] In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. Plaintiffs' allegations that it would take up to a million dollars to run an effective campaign in this state are wholly unreasonable. Several candidates, campaign managers, and

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[19] Witnesses almost unanimously agreed that the concept of an effective campaign encompasses more than just winning campaigns. Numerous witnesses testified that in a small, community-oriented, principally rural state such as Vermont it would be a mistake to equate effectiveness with the highest spending candidate. Winning was one, but not the only, measure of success described by witnesses. William Meub testified that an effective campaign is a "competitive campaign." Ruth Dwyer's campaign manager Kathleen Summers testified that an effective campaign gets name recognition for the candidate and establishes a connection between the voter and the candidate's beliefs.

past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of contribution limits established by Act 64.[20]

3. Example: The March 1999 Burlington Mayoral election. Contribution limits of $200 were in effect for the March 1999 Burlington Mayoral race. The two principal candidates for mayor in 1999 were Peter Clavelle and Kurt Wright. Both were able to amass sufficient resources to run effective campaigns. Clavelle raised almost $39,000, more than he raised in three of his four previous campaigns for mayor. He raised more than $24,000 from 794 contributors of $100 or less. Only 55 contributors gave him the maximum contribution of $200. Wright raised $19,000. Although he received 44 contributions of $200, this was only 13% of all his contributors. He received 290 contributions, amounting to over half of his funds, from contributors of $100 or less. By his own statements, Wright ran an effective campaign in a competitive race against incumbent Clavelle.

4. Curtailment of contributor expression. In the context of Vermont politics, $200, $300, and $400 donations

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[20] Mark Snelling testified that with a $400 contribution limit a candidate for Governor or Lieutenant Governor would be able to raise $300,000 to $400,000, and that candidates for those offices would not have their voices drowned out at those levels; Former Secretary of State Don Hooper testified that candidates for that office could raise sufficient funds for an effective campaign when contributions are capped at $400; Former Lieutenant Governor and Congressman Smith said that a $300 contribution limit for State Senate candidates, and $400 contribution limit for Governor and Lieutenant Governor would still permit candidates to amass sufficient funds to run effective campaigns in Vermont; Ellen David Friedman, co-chair of the Progressive Party, believes that candidates for legislative and statewide offices can amass sufficient resources to run effective campaigns at the contribution levels set by Act 64.

are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of $1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of $5 so much that she personally sends thank you notes to those donors.

b. Expenditure Limits.

1. Statistics. The evidence demonstrated that spending limits would have very little effect on House, Senate, and statewide races. Vermont House districts are extremely small. There are about 4,000 people in a single-member district and 8,000 in a two-member district. Only New Hampshire has smaller House districts. Furthermore, the voting-age population of the districts is smaller than the total population, and the number of actual voters is smaller yet. The average number of votes received by winners in single-member districts in the House in 1998 was 1,022; the average number of votes received by winners in two-member House districts was 1,585. The average spending in those districts in the past three election cycles was almost uniformly below the levels chosen for Act 64. The only exception was the single-member district average in 1994, in which the average was $10 over Act 64's $2,000 limit. No serious argument can be made that $10 would make a difference in such a race.

Average spending in Vermont Senate races for the past three election cycles has also generally been below the spending limits established by Act 64. In the two member, three-member and six member Senate districts, candidates underspent the limits applicable to these districts by amounts

ranging from $590 up to $7,120. Only in the single-member senate districts did average spending exceed the new limits.

2. Effective Campaigning. Fact witnesses confirmed that fully effective campaigns for the Vermont Senate can be run under the limits established by Act 64. Peter Brownell testified that he had run an effective campaign for the Senate as a challenger in Chittenden County while spending only $11,000 in 1996. He was re-elected in 1998 while spending only about $9,000. William Meub testified that he spent only $6,000 to $7,000 in his Rutland County Senate race in 1990 (the same district Mr. Howard ran in), and that that was enough to get his message out in that campaign. Under Act 64, nonincumbent candidates in three-seat districts like Rutland County will be able to spend $9,000.

Spending in Vermont statewide elections is very low as well. Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow.[21] Over the three election cycles, the average spending by candidates for the lower statewide races (below the level of lieutenant governor) was less than $30,000, with the exception of the losers in 1998.

The Court rejects Darcie Johnston's testimony that it is necessary to spend between $800,000 and $1 million to run an effective campaign for Governor of Vermont. No candidate for Governor of Vermont has ever spent that much money on a campaign. Nor does the Court accept that

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[21] Based on past campaigns, it is fairly clear that Act 64's spending limits would have little, if any, impact on statewide third-party campaigns. None of the third-party candidates for statewide office spent anywhere near the new spending limits in the last three election cycles.

candidates must spend approximately $500,000 in order to run effective campaigns for Lieutenant. Governor and the other lower statewide offices of Secretary of State, Treasurer, Auditor, and Attorney General. No one has ever spent this much for any of these offices, even though there have been competitive races for them.

In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters.[22] Other effective low-cost methods of campaigning include participating in debates, using volunteers to distribute literature or staff booths at markets or fairs, attending suppers and barbecues, advertising with placards during rush hour, using public access television ads, and issuing press releases to generate free coverage in the media.

Most Vermont House and Senate candidates generally do not use campaign staff or advertise on television. When television is used - primarily in campaigns for statewide office - it is relatively inexpensive compared to other states.

c. Out-of-state Funds.

1. Statistics. Although some candidates in prior elections have received more than 25% of their campaign contributions from out-of-state donors, most candidates' total income will be unaffected or only slightly affected by the limit on out-of-state contributions. In House races, the average percentage of revenues from out-of-state contributions to House candidates was 2.2% in 1998, 2.6%

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[22] Plaintiff Neil Randall, who defeated a long-term incumbent in 1998, said that door-to-door campaigning was "essential" to his success.

in 19.96, and 1.7% in 1994. In 1994, 96% of the candidates for the House raised less than 25% of their revenues from outside of Vermont. In 1996, 97.9% of the candidates for the House raised less than 25% of their revenues from outside of Vermont. In runs for Senate, the average percentage of revenues from out-of-state contributions to Senate candidates was 9% in 1998, 9% in 1996, and 7.5% in 1994. In 1994, 93.7% of the candidates for the Senate raised less-than 25% of their revenues from outside of Vermont. In 1996, 87.9% of the candidates for the Senate raised less than 25% of their revenues from outside of Vermont. In statewide races, most statewide candidates' out-of-state contributions did not exceed the 25% limit and all but one of the minor party candidates from 1994 to 1998 received no money from out-of-state contributors (one minor party candidate received $28 from a contributor in Nebraska).[23]

2. No proof that 'out-of-state' money corrupts more than in-state. There was no record before the general assembly and no evidence at trial to suggest that contributions from out-of-state sources are any more or less corrupting than those from in-state sources. Nor was there any record or evidence that out-of-state contributions have any greater appearance of impropriety than those from in-state sources.

Non-Vermont contributors may have legitimate interests in Vermont politics and policy. Some examples are second homeowners, those interested in environmental

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[23] It should be noted that these statistics understate to a certain extent the money that comes in from out of state. Consistent with Section 2805(f), money coming from out of state family members to the third degree of consanguinity would not be counted toward the 25%. Vt. Stat. Ann. tit. 17, S. 2805(f).

matters, and those interested in broader regional matters such as the Northeast Dairy Compact.

d. Limits on Contributions to and from Political Parties.

1. Statistics. Thus far, under the limits imposed on contributions to political parties by Act 64, it appears that political parties in Vermont are functioning largely as they have in the past. Vermont Republican Party Chair Pat Garahan acknowledged that as of the date of his testimony (May 2000), the party has already succeeded in raising approximately $400,000 for the year 2000 elections - all in amounts of $2,000 or less. For the entire 1998 election cycle, the party raised only about $283,000 in amounts of $2,000 or less, according to Bensen's report ($693,000 total contributions minus $410,000 raised in amounts over $2,000).

Garahan testified that he cannot be certain how much the party will raise altogether for the 2000 elections, but he expects to raise another $100,000 to $150,000. Thus, even Garahan's prediction is that the party may well raise $550,000 in the very first cycle that Act 64 is in effect compared to $693,000 when donations to the party were subject to no limits whatsoever. Even if it is assumed that Garahan is not being overly cautious in his predictions, this is a substantial portion of the party's past revenues.

2. Role of Parties in Our Political System. There is a clear link between strong political parties and orderly campaigns. In Vermont, however, get-out-the-vote efforts, seed money, candidate recruitment and training, and compilation of voter lists are just a few of the vital services that political parties provide to the electoral competition. In terms of political expression, contributions to and from Vermont political parties mean something quite different from contributions to candidates from individual

Vermonters. Contributing money to candidates is a major means by which political parties define their existence.

3. Distinction Between Parties and PACs. Political Action Committees (PACs), by contrast, function quite differently from political parties in our electoral system. Political parties may have policy platforms, but they are not targeted advocacy organizations. PACs, in contrast, are specifically designed to advocate special interests. Money coming from PACs is therefore much more likely to be designed to gain influence over legislative matters. As a result of this phenomenon, large PAC contributions are more likely to generate suspicions of undue political influence in the minds of the electorate. This makes sense, since candidates who receive money from PACs almost always know where the money comes from and why it was given.

II. DISCUSSION

A. Preliminary Matters: Jurisdiction and Standing.

1. Jurisdiction

This Court has jurisdiction to hear claims arising under 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1343(a), as well as jurisdiction over constitutional challenges pursuant to 28 U.S.C. §§ 1331 and 1343(a). Abstention is inappropriate for reasons consistent with those discussed in the Second Circuit's recent opinion *Vermont Right to Life Committee, Inc. v. Sorrell*, ____ F.3d ____, 2000 WL 1036310 (2d. Cir., July 28, 2000) ("*VRLC*").

A federal court may only abstain "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) ("*Pullman*"). "There is little or no discretion to

abstain in a case which does not meet traditional abstention requirements," *Bethpage Lutheran Serv., Inc. v., Weicker*, 965 F.2d 1239, 1244-45 (2d Cir. 1992) (internal quotation marks omitted).

Under *Pullman*, abstention may be appropriate when (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible "to an interpretation by a state court that would avoid or modify the federal constitutional issue." *Greater New York Metro. Food Council v. McGuire*, 6 F.3d 75, 77 (2d Cir.1993) (per curiam). Satisfaction of all three criteria does not automatically require abstention, however. The power is thus discretionary. In deciding how to exercise this discretion, federal courts are instructed to engage in "'a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.'" *Young v. United States Dep't. of Justice*, 882 F.2d 633, 644 (2d Cir.1989) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)).

In the present action, at least two of the *Pullman* doctrine's three prerequisites to abstention are not satisfied, because the statutory provisions at issue are not unclear and any interpretation given them by the Vermont state courts would not avoid the constitutional questions raised.

Furthermore, in *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 93-94 (2d Cir. 1998), the Second Circuit held that district courts must exercise particular caution before abstaining where a plaintiff has raised a facial constitutional challenge to a statute and the attendant delay would inhibit exercise of the First Amendment freedoms injured by the statute's existence. "In the context of First Amendment claims, *Pullman* abstention has generally been disfavored where state statutes have been

subjected to facial challenges." *Id.* at 94; *see also City of Houston, Texas. v. Hill*, 482 U.S. 451, 467 (1987).

Because the *Pullman* test is not satisfied, and because delay would clearly Plaintiffs' exercise of their First Amendment rights during the year 2000 Vermont state election campaigns, this Court will not abstain.

2. Standing

Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies." Federal courts must determine at the threshold of every case whether 'a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The threat of suit under the questioned statute may be injury enough. Plaintiffs bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that they will be prosecuted under the statute to show injury, but only that they have "an actual and well-founded fear that the law will be enforced against" them. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should

not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). "[T]he alleged danger of th[e] statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *American Booksellers*, 484 U.S. at 39.3. *See generally VRLC v. Sorrell*, 2000 WL 1036310.

Under this standard, the record supports Plaintiffs' standing to challenge each of the provisions at issue here. Defendants have meticulously challenged each Plaintiff's standing, and have broken each provision of Act 64 into the smallest possible subdivided pieces. Defendants argue, for instance, that in order for Plaintiffs to challenge Section 2805(a), which sets limits for, contributions to campaigns. for state representative, state senator, governor, lieutenant governor, secretary of state, state treasurer, state auditor,. and state attorney general, as well as for contributions to political parties and political committees, Plaintiffs must have within their ranks someone who is involved in each and every one of those elections and organizations. This extreme view of standing doctrine is excessively meticulous. It is, rather, sufficient that each Plaintiff legitimately possesses "an actual and well-founded fear that [Act 64] will be enforced against" them, *American Booksellers*, 484 U.S. at 393, and that at least one Plaintiff has legitimate standing to challenge each of the provisions at issue:

Plaintiffs Donald Brunelle, Neil Randall, George Kuusela, and John Patch, as candidates for either the Vermont House or Senate who plan to collect contributions and make expenditures in their runs for office, have standing to challenge Sections 2801(2) and (5), 2805(a), (c) and (f), 2805a(a), and 2809(a)-,(d). Plaintiff Marcella Landell, a registered Vermont voter who receives campaign literature from political organizations and candidates she wishes to

support, stands to have her First Amendment right of association curtailed by Act 64's spending limits and therefore has standing to challenge Section 2805a(a) and 2809(a)--(d). Plaintiff Jeffrey Nelson has in past election cycles made political contributions in excess of the limits established in Act 64 and therefore has standing to challenge Section 2805(b). Plaintiff Steve. Howard, who formerly held elected office in Vermont and intends to run again in the future, testified that he refrained from running for office this year because he felt Act 64 would have seriously impeded his ability to raise sufficient funds for his election campaign. He therefore has standing to challenge Sections 2801(2), 2805(a), (c) and (f), 2805a(a), and 2809(a)-(d). Plaintiff Vermont Right to Life Political Action Committee, as a registered, internal, state political action committee which intends to raise and contribute money to certain Vermont political candidates in the upcoming election, has standing to challenge Sections 2805(a) and (c), as well as 2809(a)-(d).

Plaintiffs Vermont Libertarian. Party and Vermont Republican State Committee are registered political parties in Vermont. As such, they financially support selected candidates for office by raising and contributing money to those candidates. Because they intend to carry out their supporting role for Vermont political candidates this year and in the future, they have standing to challenge all sections pertaining to the definition of, and limits on, political parties, including Sections 2301 through 2320, 2801(5), 2805(a) and (c), and. 2809(d).

Plaintiffs therefore have standing to bring this action.

B. Constitutionality of the Challenged Provisions

In evaluating constitutionality of Act 64, this Court has adopted the selection of official findings excerpted above in the facts section of this opinion. Although legislative

findings are not entirely isolated from review, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 199 (1997), this Court is required to exercise considerable deference to such findings. *Id.* Having reviewed the evidence and testimony presented to the legislature in the hearings on Act 64, this Court adopts the excerpted findings.

The Court may also, however, consider evidence presented at trial that was not available to the legislature. Consideration of such additional evidence is both proper and common. *See Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000) ("*Shrink*") (evidence relied upon by the Supreme Court in upholding Missouri's limits came almost entirely from evidence presented by the parties during litigation because Missouri does not preserve legislative history); *see also Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 456 (1st Cir. 2000) ("*Daggett II*") (relying on evidence presented during litigation to determine constitutionality of contribution limits).

1. Act 64's Contribution Limits, Vt. Stat. Ann. tit. 17, § 2805(a) and (b), As They Pertain to Individuals, Are Constitutional

Sections 2805(a) and (b) limit contributions to candidates for Vermont office in a two-year election cycle to $200 for state representative, $300 for state senator, and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general. The legislature enacted this provision because it found that large contributions reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interest of Vermont citizens. Finding (a) (9). Plaintiffs insist that the statute constitutes an impermissible limit on their free speech and

association rights, that it is not supported by a sufficient governmental interest, and that it is not narrowly tailored. As to the latter claim, Plaintiffs argued in pre-trial pleadings that the provision improperly lumps together fundraising for primary and general elections, that the provision will have a disparately negative impact on the ability of certain candidate subgroups to attain office, and that the family exception is overbroad.

The legal standard for evaluating the constitutionality of campaign contribution limits was established by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). There, the United States Supreme Court considered constitutional challenges to certain provisions of the Federal Election Campaign Act ("FECA"). Among other things, FECA limited federal campaign contributions and expenditures. Such limitations, the Court warned,

> operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the' unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley, 424 U.S. at 14-15 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Any limits on such political expression are subject to "exacting scrutiny," *id.* at 16, and can survive constitutional attack only if justified by a compelling state interest. *Id.* at 44-45.

Having established that exacting scrutiny applied generally to the area of campaign finance regulation, however, the Buckley Court then distinguished between the

different degrees of constitutional threat posed by contribution and expenditure limits. On the one hand, contribution limits could be found constitutional if they served the compelling state interest of deterring actual or perceived quid pro quo corruption. *Id.* at 25-26. On the other hand, the Court found that expenditure limits could not be similarly justified because money being spent by a candidate on him or herself could not give rise to any such quid pro quo arrangement. *Id.* at 55. *See also Kruse v. City of Cincinnati*, 142 F.3d 907, 915 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) ("A fortiori, the spending of money legally raised by candidates themselves poses no risk of quid pro quo corruption..."). In light of this distinction, the Court established a less stringent standard to be applied to contribution limits.

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

Buckley, 424 U.S. at 20. Pursuant to this less stringent standard, the Court upheld FECA's $1,000 limit on contributions by individuals or groups to candidates for federal office. The Court agreed that Congress had reason to believe that contributions over $1000 gave rise to perceptions of corruption, and that this belief was a sufficient to justify such limits. *Id.* at 26-27.

While accepting the anti-corruption rationale, however, the Court specifically rejected two other proposed government interests; namely, the spiraling cost of political campaigns, and the government's desire to level the playing field between candidates with disparate access to campaign funds. *Id.* at 25-26.

Buckley did not establish absolute dollar thresholds. "[I]f it is satisfied that some limit on contributions is

necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (quotation omitted); see also *Daggett v. Webster*, 81 F.Supp.2d 128, 139 (D. Maine 2000) ("*Daggett I*") ("If contribution limits are permissible, differences in their level 45 from state to state should reflect democratic choices, not court decisions.").

The *Buckley* Court also never explicitly stated that anti-corruption was the only acceptable compelling government interest; it only stated that spiraling costs and leveling the playing field were not acceptable. 424 U.S. at 25-26. *Buckley* therefore has not foreclosed recognition of additional compelling governmental interests.

In *Shrink*, 120 S.Ct. 897 (2000), the Court revisited the issue of contribution limits for the first time since *Buckley*. In upholding a Missouri statute that imposed a $1000 limit on individual contributions, the Supreme Court affirmed its fundamental holdings in *Buckley*: infringements upon campaign finance invoke the First Amendment and are therefore subject to "exacting" scrutiny, and the only recognized justification for them is actual or perceived corruption. 120 S.Ct. at 906-907. The *Shrink* Court further clarified that a contribution limit involving "significant interference" with associational rights can only survive if the Government demonstrates that the contribution regulation "[i]s closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." *Id.* at 904 (citations omitted). The Court repeated that its authorization of $1000 limit in Buckley wasn't based on a specific dollar amount. "[T]he dictates of the First Amendment are not mere functions of the Consumer Price index." *Id.* at 909 (quoting *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 525 (8th Cir. 1998) (dissenting opinion). Rather, the figure was adjustable and was to be

controlled by the principle that contribution limits could not be set so low as to create ineffective campaigns. *Id.*

Proof of actual or perceived corruption does not need to be exacting. "Buckley was practical on the subject of proof; it recognized that corruption could 'never be reliably ascertained.'" *Daggett I.* 81 F.Supp.2d at 134 (2000) (quoting *Buckley*, 424 U.S. at 27. All that is required is that the threat not be illusory. *Id.*

The threat of corruption in Vermont is far from illusory. Evidence provided by citizen polls and comments by public officials demonstrate that the threat is quite real. Furthermore, it is beyond argument that the public perceives corruption in the political electoral system. Typical barometers of citizen concern such as polls and media coverage point to the fact that Vermonters are troubled by how money influences campaigns. Such barometers have been used by many other courts in evaluating the governmental interest that underpins contribution limits. *See Daggett v Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 at 457 (2000) ("*Daggett II*"); *Shrink Missouri Government PAC v. Adams*, 204 F.3d 838, 841-842 (8th Cir. 2000). *See also Florida Right to Life v. Mortham*, slip op at 10, No. 98-770-Civ-Orl-19A (M.D. Fla. March 20, 2000). The Court therefore concludes that Defendants have demonstrated that the state had a sufficient governmental interest to support its adoption of contribution limits.

Having established that a compelling governmental interest justified Act 64's contribution limits, this Court must now consider whether those limits are narrowly tailored to serve that interest. In determining whether contribution limits are narrowly tailored, courts have considered factors such as cost-per-voter statistics, the level of limits that have survived constitutional challenge elsewhere, the experiences of persons running for office, costs of campaigning, types of campaigning, history of reform, and media reflection of

general public sentiment. *See, e.g., Daggett II*, 205 F.3d at 457; *Shrink Missouri Government PAC v. Adams*, 204 F.3d 838, 841-842 (8th Cir. 2000); *Florida Right to Life v. Mortham*, slip op. at 10, 98-770-Civ-Orl-19A. The Vermont legislature considered each of these factors as well.

Statistics proffered at trial show that the vast majority of contributors in the past three election cycles have made contributions at or below the maximum levels set by Act 64. Expert testimony revealed that over the last three election cycles the percentage of all candidates' contributions received over the contribution limits was less than 10%. (In two of the three previous election years, only 5% to 6% of contributors to Senate campaigns would have been affected, and only 4% to 5% of contributors to House campaigns would have been affected.)

Furthermore, Vermont's limits are squarely within the bounds of constitutionality when compared to contribution limits upheld in Maine and Missouri. In *Daggett II*, the First Circuit examined a Maine law that limited contributions to $250 for House and Senate candidates. The Court initially compared the limit with the $1,075 limit per 250,000 constituent limit upheld in *Shrink*. Given that Maine House Districts averaged 8,000 constituents and Senate Districts averaged 34,000, the Court found the $250 limit permissible in light of the *Shrink* limit. *Daggett II*, 205 F.3d at 459. It then examined the historical spending and contribution patterns of Maine elections. In light of the non-expensive nature of the typical Maine campaign and the limited impact of the limits on the historical levels of giving, the Court found the limits constitutional. Id. at 458-462. Proportionally speaking, Vermont's limits are perhaps even more generous than those of Maine, for while they are roughly comparable in dollar amount, the relevant districts in Vermont contain substantially fewer voters. Following remand from the Supreme Court, in *Shrink Missouri*

Government PAC v. Adams, 204 F.3d 838 (8th Cir. 2000), the Eighth Circuit upheld Missouri's per election contribution limits of $525 for State Senate or any office where the population of the electoral district is 100,000 or more and $275 for House or any office where the population of the electoral district is under 100,000. *Id.* at 842-43. Vermont's ratio of the contribution limit to the size of the constituency is .00068 for statewide elections, whereas the same ratio for Missouri is .00040. Vermont's statute allows over 50% more money to be contributed per constituent than does Missouri.[24]

The possibility of effective campaigning is an integral component of the narrow tailoring standard. *Shrink*, 120 S.Ct. at 900. In the present case, the Court heard ample evidence on this point, the most significant of which concerned the 1999 Burlington Mayoral election. Burlington, located in Chittenden County, is the largest city in Vermont. In terms of voting population and the cost of running an effective campaign, the Burlington Mayoral election provides a reasonable comparison to a countywide senate race. The revenues raised in that race suggest that the $300 contribution limit for State Senate races will not adversely affect senatorial candidates. The candidates for mayor of Burlington were limited to $200 contributions, yet they raised $19,000 to $39,000. The candidates for State Senate

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[24] See also *Florida Right to Life v. Northam*, slip op., No. 98-770-Civ-Orl-19A, where the District Court upheld Florida's $500 limit on contributions to candidates. While House Districts in Florida contain 90,000 residents, the largest House Districts in Vermont are barely one-tenth the size, with 4,0.00 constituents in a one-member district, and 8,000 in a two-member district. While Senate campaigns in Florida typically cost $250,000, the average Senate campaign in Vermont over the past three election cycles has been in the $7,000 to $12,000 range.

from Chittenden County will be limited to $300 contributions. In the past Chittenden County Senate candidates have spent on average $10,000, with ranges up to $30,000. Given the higher contribution limit for the Senate races, they should be able to raise at least as much as was raised in Burlington.

Witnesses did acknowledge that they may need to employ new fundraising techniques to raise this money. They may need to broaden their base of support as they seek more small contributors, rather than rely on a few large contributors. This will take more time and energy. Yet credible testimony from citizens, politicians and experts suggested that compelling candidates to increase constituent contact would improve the health of the democratic system.

The limits set by the legislature do accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public. (Young, Rivers, Pollina, Smith.) Plaintiffs testified to this as well. (Patch, Kuusela, Landell.)

Contrary to Plaintiffs' claims, Act 64's contribution limits may in point of fact actually improve candidate-voter communication by lessening the need for candidates to concentrate on wooing big donors. By diminishing the need for targeted pandering, these limits arguably enhance, rather than limit, a candidate's freedom to communicate. Statistics do reveal that some candidates may be hit harder by these limits than others. However, the overall effect on fund raising will be rather small.

Finally, the Court wishes to respond briefly to three other matters pertaining to narrow tailoring. Although these matters do not affect the Courts finding that the statute is narrowly tailored, they nevertheless came up frequently in court and each merits brief comment.

First, the legislature rejected the idea of having two different regulatory regimes for primary and general elections in favor of applying one overall limit. This was so that candidates would have greater freedom to decide how to allocate their funds between the primary and general elections. In itself, the legislature's reasoning is not evidence of insufficient tailoring. Vermont's primary is closer to the general election than is -true in most states. This year's primary election, for example, will be in mid-September, just two months before the general election. In Maine, the primary is in June. Me. Rev. Stat. Ann. 21-A § 339 (West 19___); In Missouri, the primary is in August. Mo. Rev. Stat. § 115-121 (19___). Application of the limits to the two-year election cycle is entirely reasonable given this proximity.

Second, with regard to particularly affected groups, the Court's role "is not to probe the intricacies of the limit. Even if we were to consider the effects on individual groups, we would not find enough to deem the limits facially unconstitutional." *Daggett II*, 205 F.3d at 461 (citations omitted). Plaintiffs did not prove that specific types of candidates, be they challengers or incumbents, republicans or democrats, non-wealthy, women, non-traditional, or third-party candidates, would be disproportionately affected by the contribution limits. Across the board, Plaintiffs' arguments on this point were speculative.

Finally, a few words of clarification on the exception made to these limits for family members within three degrees of consanguinity are necessary. Section 2805(f) defines "immediate family" as "individuals related to the candidate in. the first, second or third degree of consanguinity." Consanguinity is defined as "the relationship of persons of the same blood or origin." Black's Law Dictionary 299 (7th

ed. 1999); *see also MacCallum v. Seymour's Administrator*, 686 A.2d 935,937 (Vt. 1996) (noting that consanguinity means "bloodline") [25]

Act 64 does not provide what system should be used for determining relationships and degrees of kindred. In other contexts, however, Vermont relies on the civil law rules in making this determination. *See, e.g.*, Vt. Stat. Ann. tit. 14, § 552 (under Vermont's descent laws, the degrees of kindred are computed according to the rules of the civil law); *State v. Wyman*, 8 A. 900, 901 (Vt. 1887) (noting that a Vermont criminal statute in effect in 1887 provided that "degrees of kindred shall computed according to the rules of the civil law"). In order to determine degrees of kindred under the civil law rules, one "begins with the intestate, and ascend[s] from him to common ancestor, and descend[s] from that ancestor to claimant, reckoning a degree each generation." 26a *C.J.S. Descent & Distribution*, Section 22.

Applying the civil law rules to Act 64, contributions from the candidate's great-grandparents, grandparents, parents, children, grandchildren, great-grandchildren, aunts, uncles, siblings, nieces, and nephews are not limited by Act 64's contribution limitations. Contributions from the candidate's great aunts and uncles and first cousins, however, are capped by Act 64's contribution limitations.

The Court does not accept Plaintiffs' contention that the validity of Act 64's contribution limits is undermined by this exception. Act 64's contribution limits are designed to

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[25] Consanguinity is distinguished from affinity, which is the "relation that one spouse has to the blood relatives of the other spouse." Black's Law Dictionary 59 (7th ed. 1999). Contributions from the candidate's spouse and the spouse's blood relatives are limited by Act 64's contribution limitations because these contributions are from individuals related to the candidate by affinity and not by consanguinity.

target corruption. The Vermont legislature properly reasoned that a contribution from one's grandmother is not as likely to have a corrupting effect as a contribution from a tobacco company or labor union.

For all of the reasons set forth above, Act 64's contribution limits are constitutional.

2. Act 64's Expenditure Limits, Vt. Stat. Ann. tit. 17, § 2805a(a), Are Unconstitutional

Section 2805a(a) limits candidate expenditures in any given two-year election cycle to $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, attorney general, treasurer, and auditor; $4,000 for state senator plus $2,500 for each additional seat in the relevant jurisdiction and $2,000 for state representative in a single-member district, and $3,000 for state representative in two-member districts. Vt. Stat. Ann. tit. 17, § 2805a(a). In support of Act 64's expenditure limits, the Vermont legislature found, *inter alia*, that election campaigns for statewide and state legislative offices were becoming too expensive, and that as a result "many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising money." Finding (a)(1). The legislature also found that "[r]obust debate of issuers, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." Finding (a)(4). Plaintiffs insist that this is a flatly unconstitutional ban on a candidate's free speech rights.

Buckley set an extremely high constitutional threshold for expenditure limits when it held that FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and

association than do its limitations on financial contributions." *Buckley*, 424 U.S. at 24. The Court explicitly distinguished the indirect restraint on political discourse posed by contribution limits from the direct restraint posed by expenditure limits. Because "[T]he independent advocacy restricted by [FECA's spending limit] does not appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions, *id.* at 46, the Court concluded that FECA's spending limits could not be justified by deterrence of quid pro quo corruption. Quid pro quo arrangements, the Court explained, simply could not arise out of candidates spending money on dissemination of their own messages. *Id.*

Since *Buckley*, only one circuit court has considered the constitutionality of spending limits. In *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998), the Sixth Circuit struck down spending limits enacted by the City of Cincinnati for its city council elections. The court adhered narrowly to *Buckley*, reasoning that because *Buckley* held that spending limits are not justified by deterrence of quid pro quo corruption, nor by stemming the high cost of campaigns, nor by striving for a level playing field with respect to campaign funds, and because the city of Cincinnati offered only those interests, the spending limits were impermissible. 142 F.3d at 909.

There is, however -- both in Kruse and among the Justices of the Supreme Court - substantial disagreement over whether *Buckley* leaves open the possibility that other governmental interests might support spending limits. In *Kruse*, one member of the panel, while concurring in the ruling striking down Cincinnati's limits, disagreed with the majority's interpretation of *Buckley*, concluding that *Buckley* does not render spending limits unconstitutional as a matter of law.

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be... that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.

Id. at 920 (concurring opinion of Cohn, D.J., sitting by designation).

In *Shrink*, four Justices opined that neither *Buckley* nor the First Amendment should be read as an inflexible bar to spending limits Justice Breyer called for a constitutional analysis of campaign finance limits that balances competing constitutional interests. *Shrink*, 120 S.Ct. at 913 (concurring opinion of Breyer, J., joined by Ginsburg, J.). He stated that "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience . . . making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns." *Id.*

Justice Kennedy stated, "[f]or now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Id.* at 916 (Kennedy, J., dissenting).

Justice Stevens' explained that he believes that money is property, not speech, *id.*, at 910, and as such, it is entitled to the constitutional protections normally afforded to property rather than speech. "These property rights,

however, are not entitled to the same protection as the right to say what one pleases." *Id.* (Stevens, J., concurring).

Justices Stevens and Ginsburg voiced similar concerns with *Buckley* in *Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996) ("*Colorado Republican*"):

> I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in Buckley, "money is not always equivalent to or used for speech, even in the context of political campaigns." [Justice White dissented in Buckley on the campaign spending limits question.] It is quite wrong to assume that the net effect of limits on contributions and expenditures - which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials - will be adverse to the interest in informed debate protected by the First Amendment.

Id. at 649-50 (Stevens, J., joined by Ginsburg, J., dissenting) (citations omitted).

Powerful, if not controlling, judicial commentary such as this reinforces the view that the constitutionality of expenditure limits bears review and reconsideration. Spending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*: (1) "Freeing office holders so they can perform their duties," in the words of Judge Cohn, *Kruse*, 142 F.3d at 920, or, as Justice Kennedy put it, "permitting officeholders to

concentrate their time and efforts on official duties rather than on fundraising," *Shrink*, 120 S.Ct. at 916; (2) "[P]reserving faith in our democracy," *Kruse*, 142 F.3d at 920; (3) "[P]rotecting access to the political arena" as stated by Stevens, *Colorado Republican*, 518 U.S. at 649-650; and (4) "diminish[ing] the importance of repetitive 30-second commercials." *Id.*

This Court would be remiss not to acknowledge that the state proved that each of these concerns exist, and that Vermont's expenditure limits address them. The state's factual presentation at trial decidedly sets this case apart from both *Buckley* and *Kruse*. Judge Cohn remarked in *Kruse*, "[i]t should be recognized that [*Buckley*] was decided on a slender factual record. Similarly, although the City here attempted to develop a compelling factual record, it failed to do so." 142 F.3d, at 919.

The same simply cannot be said of this case. Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill.

Nevertheless, this Court is bound by the doctrine of *stare decisis* to adhere to Supreme Court precedent. In view of the absence of case law on this matter in this circuit, and the Supreme Court's directives in Buckley, this Court cannot take the unprecedented step of finding expenditure limits constitutional. *Kruse* is the only case on this matter other than *Buckley* itself. Its interpretation of *Buckley* must therefore be given proper consideration as well.

It is not insignificant that as soon as *Buckley* came out the Vermont legislature amended its campaign finance regulations by eliminating mandatory spending limits. *See supra*, at 8-9. At the very least this should be considered some indication of what the Vermont legislature thought of the dubious constitutionality of such limits at that time.

Furthermore, spending limits do not exist anywhere in the country other than in the city of Albuquerque, New Mexico, and no one has challenged those limits yet.

Accordingly, Act 64's spending limits are unconstitutional.

3. Act 64's 25% Limit On Out-Of-State Funds, Vt. Stat. Ann. tit. 17, § 2805(c), Is Unconstitutional.

Section 2805(c) limits out-of-state contributions to 25% of a candidates total contributions. Vt. Stat. Ann. tit. 17, S 2805(c). In support of these limits, the Vermont legislature found that "large contributions . . . particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." Finding (a)(9). Plaintiffs argue that this impermissibly infringes on protected speech.

The only two reported decisions on the subject of out-of-state contributions were decided by the Ninth Circuit Court of Appeals. *Vannatta v. Keislinq*, 151 F.3d 1215 (9th Cir. 1996); *Whitmore v. Federal Election.Comm'n*, 68 F.3d 1212 (9th Cir. 1995). Both decisions held that such contributions could not be restricted. In *Vannatta* the Ninth Circuit affirmed an injunction against a statute similar to the one challenged in this case. That statute limited to 10% the amount of money that could be contributed by out-of-district donors. 151 F.3d at 1218. Applying the rigorous scrutiny standard established by the Supreme Court for infringements on First Amendment rights, the panel unanimously agreed that the measure could not be supported by the state's interest in preventing corruption since out-of-state contributors are no more linked to corruption than in-state contributors. *Id.* The Court also rejected a second interest purportedly advanced by the measure, protecting the

integrity of a republican form of government by assuring that representatives are elected by their own constituents. *Id.*

Defendants contend that limits on out-of-state contributions combat the perception that the Vermont legislature might be unduly influenced by out-of-staters. Defendants' argument on this point is not well focused. Firstly, most if not all of the examples of allegedly suspicious out of state contributions enumerated by Defendants -- and especially those targeted by the press -- also happened to be large and often from special interest groups that are viewed by. the public stereotypically as the source of suspicious campaign money. There was no evidence that the fact that the money came from out of state is necessarily the root of the problem. Secondly, the proffered justification does not account for the fact that many people outside of Vermont have legitimate stakes in Vermont politics, and therefore have a right to participate in Vermont elections. Individuals from outside Vermont who are nevertheless influenced by Vermont law must have some access to the political process here.

In addition to the fact that the out-of-state contribution limit lacks the support of a legitimate governmental concern, the provision is also unconstitutional because it is not narrowly tailored. The mechanics of the provision are flawed in that it functions as a complete ban on the ability of some Vermont state level candidates to receive contributions from certain out-of-state would-be contributors.

Because no recognizable state interest exists to justify the out-of--state limits, and because the provision is not narrowly tailored, it violates the First Amendment freedoms of speech and association.

4. Act 64's Limit on Contributions to Political Parties, Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b), is

Constitutional, But The Limit on Contributions from Political Parties to Candidates Is Not.

a. Act 64's Limits on Contributions to Political Parties Are Constitutional

Section 2805(a) limits contributions to political parties to $2000. The legislature enacted this provision in order to prevent evasion of the individual contribution limits. Two separate questions of law govern the constitutionality of this provision: is it constitutional to regulate such contributions at all, and if so, to what extent?

Buckley upheld FECA's $25,000 aggregate annual limit on contributions by an individual, computed by combining an individual's contributions to all federal candidates, national political parties, and political committees in a given year. 424 U.S. at 25-26. The Court explained that the aggregate limit on contributions to all those entities was justified because it "serves to prevent evasion of the $1,000 contribution limitation [on donations to candidates] by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of... huge contributions to the candidate's political party." Id. Given that Buckley's aggregate contribution limits encompassed contributions to political parties, Act 64's specific limits, on contributions to political parties deserve no different treatment - both are specifically and legitimately designed to prevent circumvention of individual contribution limits.

Three of the four opinions in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), indicate that a majority of Justices continue to endorse limits on contributions to political parties. The plurality opinion, while invalidating limits on independent expenditures by

political parties, indicated that direct donations to political parties could be limited:

> The greatest danger of corruption . . appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties.

Id. at 617 (plurality opinion of Breyer, O'Connor and Souter).

The two dissenting Justices in *Colorado Republican*, Justices Stevens and Ginsburg, would have sustained the limits on independent expenditures by parties that were directly at issue in the case and, therefore, would sustain limits on direct contributions to and by parties. *Id.* at 649. Justice Kennedy's opinion, joined by Chief Justice Rehnquist and Justice Scalia, carefully distinguished between limits on coordinated expenditures, viewed as protected expression by the party itself, and "undifferentiated political party contributions." *Id.* at 628-629. Justice Kennedy stated that Congress may have the authority to regulate the latter, but noted that such a regulation was not at issue in the case. *Id.* at 630.

Lower courts have upheld state limits on contributions to political parties as well. In *Citizens for Responsible Government State PAC v. Buckley*, 60 F.Supp.2d 1066, 1094-1096 (D.Colo. 1999), the court upheld an annual limit of $2,500 on individual contributions to political parties in Colorado. "In order to prevent circumvention of individual contribution limits, Congress

can directly limit contributions to political parties..." *Id.* at 1095. *See also State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) ("*AkCLU*") (upholding limit of $5,000 on contributions to political parties in Alaska).

Anti-evasion is thus a well recognized and accepted justification for establishing limits on giving to parties within campaign finance regulatory schemes. *Citizens for Responsible Government State PAC v. Buckley*, 60 F.Supp.2d at 1095. As the legislative findings state, Act 64's limit on giving to political parties was designed specifically to prevent evasion of the $200, $300, and $400 limits on contributions to candidates from individuals. Absent the provision, this loophole would permit large sums of money from a particular interest to reach candidates by passing through a political party. Although Vt. Stat. Ann. tit. 17, § 2805(e) prohibits the purposeful transfer of funds to a person for the purpose of further transferring it to a candidate, that provision is likely to catch only the most blatant behavior.[26]

The Court turns now to the question of narrow tailoring. Act 64's $2,000 limit on contributions to parties passes the narrow tailoring test so long as its dollar amounts are not "so radical in effect as to render political association ineffective, drive the sound of [a political party's] voice below the level of notice, and render contributions pointless. Shrink, 120 S.Ct. at 909.

The limits established by Act 64 hardly drive the voice of contributors to political parties so low as not to be

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[26] It was hardly speculative on the part of the legislature to think that such end runs would have been attempted. Indeed, Plaintiff Jeffrey Nelson testified that because of the limit on contributions to candidates he has already shifted his donations to the Republican Party and the Republican Legislative Election Committee PAC. It is reasonable to assume that larger special interest donors would do the same.

heard. Donors may give $2,000 to a Vermont political party even if they have already made direct contributions to any number of individual candidates of the same party for Vermont office. Evidence clearly established that $2,000 contribution is a very large contribution in the context of Vermont politics. In comparison to the contribution limits. set for individual candidates, and in light of the testimony about what constitutes a large contribution in the eyes of the Vermont public, these limits in fact allow for very loud voices. Within the legislature's scheme for regulating campaign money, Act 64 actually promotes party activity above that of individual donors by allowing much higher donations to parties than to candidates.

Evidence of recent fundraising also suggests that the limits are at an appropriate level. Under the limits established by Act 64, the Republican Party had already raised $400,000 for the 2000 elections at the time of trial and expected to raise another $100,000 - $150,000, for a total of $500,000 - $550,000. By comparison, in 1998 when the Party raised more than in any other past election cycle, it raised a total of $693,000. Based on the Vermont Republican State Committee's experience so far, it appears its revenue will not decline as much as party revenues did in Alaska when similar limits were imposed. In *AkCLU*, 978 P.2d at 623, the limits on contributions to parties were upheld despite evidence showing that state Republican party revenues had declined from $362,525 in 1995 to $119,917 in 1997.

Given that Act 64's limit on contributions to parties serves the legitimate governmental interest of preventing evasion of individual constitutional limits, and given that the limit level will not unduly hush the voice of political parties in Vermont, the limit is constitutional.

b. Although Limits on Contributions from Parties to

Candidates Are Constitutional Generally, Act 64's Limits Are Unconstitutionally Low.

Because political parties play a unique role in the mechanics of our democracy, limits on contributions by them to candidates deserve especially careful attention. As the Tenth Circuit put it earlier this year:

> Political parties have played a vital role in the American system of government.
>
> [A]stute observers[] all agree that the political party is---or should be--central to the American political system.. Parties are--or should be-integral parts of all political life, from structuring the reasoning and choice of the electorate, through all facets of campaigns and seemingly all facets of the government, to the very possibility of effective governance in a democracy.
>
> John H. Aldrich, Why Parties: The Origin and Transformation of Political Parties in America 18 (1995). . . . In its FECA enactments, Congress certainly recognized the importance of parties.
>
> The Supreme Court likewise has acknowledged the role of the party. Indeed, all three branches of government, to an important extent, rely on the speech and associational functions of parties to assure the orderly conduct of elections, appointments and governance in general.

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 213 F.3d 1221, 1228 (10th Cir. 2000) (citations and quotations omitted). Proper consideration of this role, however, must be balanced. against the threat of corruption that often filters through the

party machines: "There is genuine potential for corrupting undue influence on a candidate's campaign if political parties are not restricted in their ability to contribute to individual candidates." *Citizens for Responsible Government*, 60 F. Supp. 2d at 1094; "Absent any limits on contributions by parties, we believe there would be substantial potential for undue influence, i.e., *quid pro quo* corruption or the appearance of corruption. The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself." *AkCLU*, 978 P.2d at 626.

In an opinion rendered earlier this year, *Missouri Republican Party v. Lamb*, 100 F.Supp.2d 990 (E D, Mo. June 22, 2000), the District Court for the Eastern District of Missouri confirmed that such limits are constitutional under *Shrink*. There, Judge Perry reflected on the importance of ancillary contribution limits to deter evasion of individual limits.

> Although [*Shrink*] does not directly answer the question of whether contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals, it answers the question indirectly by making clear that their constitutionality hinges on the type of financial support being given to the candidate, not the identity of the contributor: "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." [*Shrink*], 120 S.Ct. at 904 [cites omitted]. . . . Because [*Shrink*] expressly approved Missouri's claimed interests in limiting individual contributions, it follows that the state's corresponding limits on political parties must also be upheld as long as the same rationale applies and they meet the criteria set out in [*Shrink*].

Lamb, 100 F.Supp.2d at 996 (citations omitted). Elsewhere, Justice Kennedy recognized this as well.

> Congress may have the authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley.

Colorado Republican, 518 U.S. at 630.

Colorado Republican does not bar limits on the amounts political parties may contribute to candidates. That decision struck down federal limits on independent expenditures by political parties, not limits on contributions directly to candidates. See *AkCLU*, 978 P.2d at 626 (noting that Supreme Court's *Colorado Republican* decision addressed independent expenditures, not contributions, and therefore does not apply in analyzing constitutionality of limits on contributions).

Limits on contributions from parties to candidates - like contributions from individuals to parties - cannot be so radical in effect as to render political association between parties and candidates ineffective. *Shrink*, 120 S.Ct. at. 909. *See also Lamb*, 100 F.Supp.2d at 995. In *Lamb*, the limits at issue were comparatively high - roughly $10,000, $5,000, and $2,000 for statewide, house and senate races. *Id.* at 991. In upholding them, the Court observed first that in the period since the Missouri limits became effective, candidates had been quite capable of amassing sufficient funds to run effective races. Second, the court noted that the limits were ten times higher than those found constitutional in *Shrink*. *Id.* at 1000. Given those facts, the court did not see how the limits "could destroy Missouri's burgeoning campaign climate." *Id.*

Act 64's limits on parties -- $400, $300, and $200 - are far more stringent than those upheld in *Lamb*. More stringent, even, than the small scale of Vermont. politics would justify. Political parties speak with a different voice than individuals. Such limits would reduce the voice of political parties town undesirable, and constitutionally impermissible, whisper. For the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past.

Although limits on the ability of a party to contribute money to candidates are vital to deter avoidance of the individual contribution limits, the current limits are too low to pass constitutional muster.

c. Challenge to Sections 2801(5) and 2301-2320.

Act 64 defines political party as "a political party organized under Chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, Section 2801(5). Under this definition, all town, county and state committees of a political party are treated as a single entity which is subject to a single contribution limit. This construction of the statute has been confirmed by the Vermont Secretary of State.

Plaintiff Vermont Republican State Committee asserts that the Republican Party of Vermont is not one monolithic party, but a loose federation of independent, autonomous smaller parties. Each of these smaller organizations, Plaintiff contends, should enjoy its own independent rights of speech and association, and therefore should be able to contribute money to candidates up to the permissible limit. Plaintiff therefore argues that Section 2801(5), as interpreted by the Secretary of State, is an

impermissible restriction on the internal organization and composition of the Vermont Republican Party.

By making this argument, however, the Vermont Republican Party proves to be inconsistent with the way it represents itself to the Court. While the State Committee claims that each of these committees is independent from one another and that the State Committee does not control the committees of the counties and towns, it stated in its Amended Complaint that it was bringing this lawsuit "on its own behalf and on behalf of its members, including its candidates, and all Republican town and county committees. Plaintiff VRSC Amended Complaint, at 1. Numerous witnesses confirmed that, despite the complaint's averment that it was brought on behalf of all county and town committees and all Republican candidates, none. of those entities or individuals was asked to vote on or approve the lawsuit by the State Committee.

Furthermore, Vermont is by no means the first government authority to treat state, county and town committees as one for purposes of campaign finance. The federal government treats them as one in its provisions for limits on contributions to federal candidates. *See generally*, 2 U.S.C. Chapter 14 (Federal-Election Campaigns).

Plaintiffs' challenge to 2801(5) and Chapter 45 is without merit.

5. Act 64's Limits on Contributions to and from Political Committees and Organizations, Vt. Stat. Ann. tit. 17, §§ 2805(a) (b), are Constitutional.

Sections 2805(a) and (b) limit contributions from individuals to political action committees (PACs) to $2000, and limit contributions from PACs to candidates to the same levels applied to individuals - $200, $300, and $400 depending on the office.

a. Limits on contributions to PACs are constitutional.

Under *Buckley*, a limit on contributions to PACs is "no more than a corollary of the basic individual contribution limitation." *Buckley*, 424 U.S. at 38 (upholding an aggregate limit of $25,000 on individual contributions to candidates, PACs, and political parties combined based on the potential that would otherwise exist for evasion of the individual contribution limits).

The Supreme Court affirmed this position in *California Medical Association v. Federal Election Commission*, 453 U.S.182, 199 (1981) (plurality opinion) ("*Cal-Med*"); *id.* at 203-04 (Blackmun, J., concurring in part and concurring in the judgment). There, the Supreme Court upheld a $5,000 federal limit on individuals' contributions to multi-candidate PACs, reasoning,

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multi-candidate political committee....which advocates the views and candidacies of a number of candidates.

Cal-Med, 453 U.S. at 197 (plurality opinion).

Lower courts have repeatedly followed the Supreme Court's lead in upholding limits on contributions to PACs. *See, e.g., Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997) (upholding $1500 aggregate annual limit on contributions by an individual to all permanent committees (equivalent to PACs)); *Florida Right. to Life v. Mortham*, No. 98-770-Civ-Orl-19A, slip op. at 21 (M.D. Fla. March 20, 2000) (upholding $500 limit on contributions to political committees); *cf., Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998) (implicitly acknowledging state's right to impose some limit on contributions to political committees, but invalidating limitation of $200 as too low); *Citizens for Responsible Government v. Buckley*, 60 F. Supp. 2d1066, 1088 (D. Colo. 1999) (acknowledging that "the State has a compelling interest in limiting contributions to political committees, but holding that limit of $250 was too low).

Both *Buckley* and *Cal-Med* rejected the argument that limits on contributions to PACs are suspect because of the possibility that they might limit funds that the PAC could spend on matters other than political campaigns. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.'" *Cal-Med*, 453 U.S. at 197 (plurality opinion) (quoting *Buckley*, 424 U.S. at 21). *Cf. Cal-Med*, 641 F.2d 619, 626 n.5 (9th Cir. 1980)(denying contention that the "effect of the limitation in restricting money spent by-committees for independent expenditures, rather than candidate contributions, should be given serious consideration in evaluating the constitutionality of that limitation."), *aff'd*, 453 U.S. 182 (1981).

In terms of both underlying rationale and application, Act 64's limit on contributions to PACs is consistent with all of the limits that have already withstood constitutional challenge. It is therefore constitutional.

b. Limits on Contributions from PACs to Candidates.

Buckley did not distinguish between individuals and PACs when it accepted the government's anti-corruption justification for FECA contribution limits. 424 U.S. at 38.

Furthermore, Plaintiffs have offered no explanation for why PACs should be treated differently than individuals with regard to the amount that they should be allowed to contribute to political candidates. Indeed, the anti-corruption rationale that supports limits on individual contributions is arguably even stronger when applied to PAC contributions. As their name suggests, PACs exist in order to affect certain political action. The likelihood of actual *quid pro quo* arrangements between PACs and candidates is high; higher, perhaps, than for individual donors and candidates.

Additionally, limiting PAC contributions to candidates is consistent with the goal of deterring circumvention of the individual limits; without a limit on contributions from PACs individuals might well funnel, money in excess of the individual limits to a given candidate.

Because the Supreme Court has not drawn a distinction between PAC contributions and individual contributions for the purposes of First Amendment Analysis, and because the potential for actual or perceived quid pro quo corruption of candidates is high with such contributions, Act 64's limits on PAC contributions to candidates do not violate the First Amendment.

6. Act 64's Limits on Related Expenditures, Vt. Stat. Ann. tit. 17, § 2809, Are Constitutional.

Section 2809 provides that related campaign expenditures made on a. candidate's behalf shall be considered a contribution to the candidate and, if the related expenditure is over $50, it will also count as an expenditure by that candidate. Vt. Stat. Ann. tit. 17, §§ 2809(a) and (b). An expenditure by an individual is only considered related if it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates," and is "intentionally

facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). An expenditure made by a political party or by a political committee is presumed to be related if it primarily benefits six or fewer candidates who are associated with the party or committee. Vt. Stat. Ann. tit. 17, § 2809(d). The Secretary of State has determined that the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate.

Consistent with Act 64's regulation of party contributions and PAC contributions, this measure was designed to plug a loophole that would have allowed for circumvention of Act 64's individual contribution limits. Clearly, political candidates should not be able to evade campaign finance regulations simply by asking others to collect and spend money for them. This practice would foil the underlying motivation for the Act completely.

b. Counting Related Expenditures as Contributions is Constitutional.

The Supreme Court has unequivocally stated that unrelated, or "independent," expenditures - regardless of whether they are made by people, PACs or political parties - may not be regulated. *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (the Constitution "grants to individuals, candidates, and ordinary political committees the right-to make unlimited independent expenditures."); *see also FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (striking down limit on independent expenditures by PACs); *Buckley*, 424 U.S. at 50 (striking down limit on independent expenditures by any "person"). "Coordinated," or "related"

expenditures, on the other hand, can be regulated. *Buckley*, 424 U.S. at 36-37, 46-47.

> [i]f . . . basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates. The expenditure of resources at the candidate's direction . . . provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fund raising event or the food .... Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.

Id. at 36-37.[27] In *Colorado Republican Campaign Committee v. FEC* a plurality of the Court confirmed this

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[27] The Buckley Court described the difference between coordinated and independent expenditures as follows:

> Section 608(b)'s contribution ceilings rather than 608(e)(1)'s independent expenditure limitation prevent. attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the. candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

424 U.S. at 46-47.

understanding of Buckley, at least with regard to coordinated contributions of individuals and political committees. 518 U.S. at 624-25.

Act 64's test for whether an expenditure is related is not vague. Under Act 64, expenditures are considered related only when such expenditures have been "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Persons wishing to make expenditures on their own to promote a candidate are completely free to do so in any amounts they desire. With such an explicit standard in place for differentiating between related and independent expenditures, individuals should be able to discern when they are acting in concert with a given candidate or candidate committee and when they are not.

With respect to the application of Section 2809 to PACs and political parties, there is no precedent to support Plaintiffs' argument that related expenditures by PACs and political parties should be entitled greater protection than related expenditures by individuals. Indeed, entitling them to such protection would create precisely the same potential for evasion of direct contribution limits that led the *Buckley*

Court to uphold FECA's challenged limits on coordinated expenditures by individuals. *Buckley*, 424 U.S. at 36-37. To forbid, or even substantially loosen, regulation of party or PAC expenditures that are coordinated with candidates would undermine the purposes of Act 64.

Furthermore, this Court cannot agree with the 10th Circuit's novel ruling in *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. May 5, 2000). A panel of the court held that Congress may not place any limits on coordinated expenditures made by political parties. *Id.* at 1223. The Tenth Circuit's holding violates the spirit of both *Buckley* and *Shrink*. In vigorous dissent, Chief Judge Seymour recognized this, pointing out that "the majority creat[ed] a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians." *Id.* at 1233. Chief Judge Seymour further opined that "the majority has substituted a paean to its view of the role of political parties for a properly deferential assessment of the constitutionality of limits on coordinated party contributions under applicable Supreme Court authority." *Id.* at 1244.

The majority opinion rejected exactly the type of evidence found to be sufficient in *Shrink* concerning the potential for corruption, and imposed its own view that political parties do not pose any danger of corruption. *Id.* at 1223. *Shrink* directly rejected the contention that government may not act to regulate campaign finance practices absent quid pro quo corruption: "In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern not confined to, bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 120 S.Ct. at 905 (quoting *Buckley*, 424 U.S. at 27). In the

current case, this Court has been presented with precisely the evidence accepted by the *Shrink* Court and rejected by the Tenth Circuit in *FEC v. Colorado Republican* -- trial testimony from would-be and actual politicians, as well as expert empirical analysis demonstrating the influence donors have on politicians.

For these reasons Act 64's requirement that related expenditures by political parties, PACs and individuals be counted as contributions to the candidates they help is constitutional.

It should be noted that as a result of this holding, related expenditures so defined by Section 2809 will also be subject to the $200, $300, and $400 contribution limits imposed on individuals and PACs by Section 2805(a).

b. Counting Related Expenditures as Candidate Expenditures Is Unconstitutional.

The Court has already ruled above that regulating the expenditures of candidates is unconstitutional. Therefore, Section 2809(b), which states that if the related expenditure is over $50 it counts as an expenditure by that candidate, is unconstitutional as well.

c. The Rebuttable Presumption, Vt. Stat. Ann. tit. 17, § 2809(d), Is Constitutional.

Section 2809(d) provides that if an expenditure is made by a political party or political committee and supports six or fewer candidates, a presumption is triggered that it is a related expenditure under Act 64. Plaintiffs argue that this presumption is a content-based restriction of speech aimed at discouraging advertisements that are devoted to a small number of candidates, and that as such, it violates the First Amendment.

The Administrative Rule promulgated by the Secretary of State pursuant to the authority granted under Section 2809(f), however, explicitly states that, even with respect to a party or political expenditure targeted to six or fewer candidates, the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate(s). The Administrative Rule is consistent with the legislative history of Act 64, which shows that the presumption was, at all times, intended to be rebuttable.[28]

Section 2809(d) thus provides nothing more than a guideline to assist in compliance with the statute by political parties and political committees. As such, it is not an impermissible restriction on Plaintiffs' First Amendment rights. In fact, it specifically draws the line between expenditures that can be constitutionally regulated, and those that cannot. It is therefore constitutional.

C. Severability

Vermont law provides that "[T]he provisions of any act are severable. If any provision of an act is invalid, or if any application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or applications which. can be given effect without the invalid provision or applications." Vt. Stat. Ann. tit. 1, § 215.

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[28] Representative Terry Bouricius, who sponsored the amendment creating a presumption for expenditures by parties or political committees on behalf of six or fewer candidates, made it clear that this presumption is not conclusive, but rebuttable. Bouricius explained, "you can rebut the presumption. . . . So it's not an absolute." Bouricius also testified that expenditures on behalf of six or fewer candidates were more likely to be part of the campaign.

Plaintiffs have challenged certain parts of Act 64, not the entire law.

Each challenged provision has been examined separately. According to Vermont law, a court must sever only the unconstitutional feature, phrase, or word of a statute leaving the remainder of the statute as an operative whole. Whenever possible, "[t]he unconstitutionality of a part of an Act does not necessarily defeat...the validity of its remaining provisions.. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Veilleux v. Springer*, 131 Vt. 33, 41, 300 A.2d 620, 625 (Vt. 19.73) (quoting *United States v. Jackson*, 390 U.S. 570,585-86 (1968) (striking unconstitutional penalty provision from statute)); *see also Bagley v.. Vermont Dept. of Taxes*, 500 A.2d 223, 226 (Vt. 1985) (severing unconstitutional phrase from otherwise valid statute because court concluded that legislature would have enacted law even if it had lacked the unconstitutional provision); *State v. Stevens*, 408 A.2d 622 (Vt. 1979) (striking word from statute as being unconstitutionally vague in order to effectuate the legislative intent).

Accordingly, the Court concludes that the unconstitutional sections -- Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b) in part, §2805(c), 2805a(a), and 2809 in part -- may be, and are, in accordance with this opinion, severed from the remainder of Act 64.

III. CONCLUSION

Free speech and association are among most revered pillars of our democratic society. In the words of Justice Louis Brandeis: "freedom to think as you will and speak as you think are means indispensable to the discovery and

spread of political truth; ... public discussion is a political duty; and this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927). "Virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. Restrictions on the amount of money people or groups can spend on political advocacy therefore necessarily reduce the quantity and effectiveness of their expression. *Id.*, The exercise of those freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others - those who cannot make such large contributions. The integrity of our democracy is inextricably bound to the voices of those with lesser means. Thus, the categorical preservation of free speech and association cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government.

Act 64 represents a thorough, effective, and -- with the exception of expenditure limits, out-of-state contribution limits, and limits on party contributions to candidates -- entirely constitutional attempt by the Vermont legislature to address the real-world problem of excessive money in politics while keeping inside the philosophical dictates of Buckley. Today, this Court has upheld the Act to the furthest extent that the First Amendment will allow.

Wherefore, the Court rules as follows:

1. Act 64's contribution limits to candidates, Vt. Stat. Ann. tit. 17, §2805(a)-(b), are constitutional as they pertain to individuals.

2. Act 64's expenditure limits, Vt. Stat. Ann. tit. 17, §2805a(a), are unconstitutional.

3. Act 64's 25% limit on out-of-state funds, Vt. Stat. Ann. tit. 17, §2805(c), is unconstitutional.

4. Act 64's $2000 limit on contributions to political parties, Vt. Stat. Ann. tit. 17, §2805(a)-(b), is constitutional. However, the limit on contributions from political parties to candidates, codified at same, is unconstitutionally low. Act 64's definition of state and local parties as one entity pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5), and 2301 through 2320, is constitutional.

5. Act 64's $2,000 limit on contributions to political committees, and its various limits on contributions by political committees to candidates, Vt. Stat. Ann. tit. 17, §2805(a)-(b), is constitutional.

6. Act 64's regulation of related expenditures, Vt. Stat. Ann. tit. 17, §2809(a)-(c), is constitutional as it relates to candidate contributions, but unconstitutional as it relates to candidate expenditures. Additionally, Section 2809(d)'s establishment of a rebuttable presumption that an expenditure by a political party or political committee is related if it benefits six or fewer candidates, as clarified by the Secretary of State, is constitutional.

7. Defendants are herewith enjoined from enforcing the unconstitutional provisions mentioned above against Plaintiffs.

Dated at Burlington, Vermont this 10th day of August, 2000.

/s/_____

William K. Sessions, III
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 00-9159(L), 00-9180(Con), 00-9231(xap), 00-9139(xap), and 00-9240(xap)

MARCELLA LANDELL, et al., *Plaintiffs*,
NEIL RANDALL, et al., *Plaintiffs*,
and VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants*,
and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al., *Defendant-Intervenors*

Before: _____

WINTER, STRAUB, and POOLER, *Circuit Judges*.

(Argued: May 7, 2001
Decided: August 7, 2002
Withdrawn: October 3, 2002
Amended Opinion Issued: August 18, 2004)

Appeal from the entry of a judgment by the United States District Court for the District of Vermont (William K. Sessions, III, *Chief Judge),* reviewing the constitutionality of

Vermont's Act 64, Vt. Stat. Ann. tit. 17, §§ 2801-2883, which imposes expenditure and contribution limitations on campaigns for state office. Our opinion dated August 7, 2002 was withdrawn on October 3, 2002.

We hold today that the Supreme Court's decision in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*) does not operate as a *per se* bar to campaign expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests. We find that Vermont has established two such compelling interests in support of its expenditure limits (§ 2805a): preventing the reality and appearance of corruption and protecting the time of candidates and elected officials. Nevertheless, we remand for further findings on an aspect of the narrow tailoring inquiry that the District Court did not reach: whether there are less restrictive means of achieving these goals. We also remand for analysis of whether treating related expenditures as candidate expenditures (§ 2809(b)) is constitutionally permissible.

With regard to Act 64's contribution limits (§ 2805), we find that they survive constitutional scrutiny in large part but that Vermont's attempt to limit contributions from out-of-state sources (§ 2805(c)) is unconstitutional. We remand for further consideration of whether Act 64 regulates the ability of political action committees ("PACs") to make independent expenditures (§§ 2801(4), 2805(g)), and if so, whether such regulation is constitutional. Finally, we remand for further findings on whether Act 64's limits on the transfer of money from national political parties to state and local affiliates (§§ 2801(5), 2805(a)-(b)) imposes impermissible burdens on the operation of political parties.

The District Court judgment is affirmed in part, vacated in part, and remanded for further proceedings.

Judge Winter dissents in part in a separate opinion.

TIMOTHY B. TOMASI, Asssistant Attorney General, Montpelier, VT (Richard A. Johnson, Jr., Christopher G. Jernigan, Assistant Attorneys General, Office of the Attorney General, William H. Sorrell, Attorney General, Montpelier, VT, of counsel), for *Defendants-Appellants-Cross-Appellees William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand, and Deborah Markowitz.*

BRENDA WRIGHT, National Voting Rights Institute, Boston, MA (Bonita Tenneriello, John C. Bonifaz, Gregory G. Luke, National Voting Rights Institute, Boston, MA; Peter F. Welch, Welch, Graham & Mamby, Burlington, VT; of counsel), for *Intervenors-Defendants-Appellants-Cross-Appellees Vermont Public Interest Research Group, the League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.*

MITCHELL L. PEARL, Langrock Sperry & Wool, LLP, Middlebury, VT (Peter F. Langrock, Langrock Sperry & Wool, LLP, Middlebury, VT; Joshua R. Diamond, Diamond & Robinson, Montpelier, VT; David Putter, Montpelier, VT; Mark J. Lopez, American Civil Liberties Union, New York, NY;

American Civil Liberties Foundation of Vermont; of counsel), for *Plaintiffs-Appellees-Cross-Appellants Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and Vermont Libertarian Party.*

JAMES BOPP, JR., Bopp, Coleson & Bostrom, Terre Haute, IN (James R. Mason, III, Eric R. Bohnet, Aaron Kirkpatrick, Bopp, Coleson & Bostrom, Terre Haute, IN, of counsel), for *Plaintiffs-Appellees-Cross-Appellants Donald R. Brunelle, Vermont Right to Life Committee, Inc., Vermont Republican State Committee, Vermont Right to Life Committee-Fund for Independent Political Expenditures, and Marcella Landell.*

JANE R. ROSENBERG, Assistant Attorney General, Hartford, CT (Eliot D. Prescott, Assistant Attorney General, Richard Blumenthal, Attorney General, Hartford, CT, of counsel), for *Amici States of Colorado, Connecticut, Maryland, New York, and Oklahoma.*

GILLIAN E. METZGER, Brennan Center for Justice at New York University School of Law, New York, NY (Nancy Northup, Brennan Center for Justice at New York University School of Law, New York, NY, of counsel), for *Amicus Brennan Center for Justice at New York University School of Law.*

STRAUB, *Circuit Judge:*

During his 1997 inaugural address, Vermont's Governor offered the Vermont General Assembly a moment of telling candor: "As I've said before, money does buy

access and we're kidding ourselves and Vermonters if we deny it. Let us do away with the current system." The General Assembly responded by promulgating Act 64, a comprehensive campaign finance reform package. The testimony and statements made during the General Assembly's debate demonstrated that Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much of campaign finance reform. Typically, this fear of corruption has involved the danger that politicians will sell their votes for campaign funds. The Vermont debate highlighted something else that public officials can, and apparently do, offer in exchange for funds: time and access. The General Assembly, together with the State's chief executive, concluded that Vermont needed limitations governing its campaigns for state office with respect to both expenditures and contributions.

This appeal arises from a consolidated suit which brings a First Amendment challenge to key sections of Act 64. The plaintiffs have argued that Vermont's reform violates the First Amendment guarantee of free speech and association in the political realm. At the conclusion of a bench trial, the District Court enjoined the enforcement of Act 64's limitations on expenditures, gifts by non-resident contributors, and contributions by political parties to candidates. The District Court upheld all of Act 64's other contribution limitations, including limits of between $200 and $400 on contributions to candidates by individuals and political action committees, limits of $2000 on contributions to political parties and political action committees, and regulations treating coordinated expenditures by third parties as contributions to a candidate.

All parties have appealed that decision. We are therefore asked to determine whether the First Amendment rights of free speech and political association forbid each of the challenged provisions, including (1) Vermont's campaign expenditure limitations; (2) the contribution limits

applied to candidates; (3) the contribution limits applied to political parties and political associations; (4) the limit on contributions by non-residents; and (5) the regulation of coordinated expenditures by political parties.

After issuance of the original opinion in this case, *see Landell v. Sorrell,* Nos. 00-9159(L), 00-9180(Con.), 00-9231(xap), 00-9139(xap), and 00-9240(xap) (2d Cir. Aug. 7, 2002) (slip op.), in which we upheld in large part both Act 64's contributions limits and its expenditure limits, plaintiffs filed a petition for rehearing *in banc.* We withdrew our original opinion on October 3, 2002, pending further proceedings. *Landell v. Sorrell,* Nos. 00-9159(L), 00-9180(Con.), 00-9231(xap), 00-9139(xap), and 00-9240(xap), 2002 WL 31268493 (2d Cir. Oct 03, 2002). Having reconsidered our holding and taking serious note of the views presented during the rehearing process, we now issue this amended opinion, modifying our holding only with regard to Act 64's expenditure limits. In both instances, our colleague, Judge Winter, has dissented.

As we did in our original opinion, we hold today that the Supreme Court, in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.[1] In applying the narrow tailoring test, we hold that

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[1] We draw some support for our interpretation of *Buckley* from the Supreme Court's recent decision in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619 (2003) (upholding legislation that, inter alia, limited "soft-money" campaign contributions and regulated electioneering communications). We recognize, of course, that *McConnell* addresses contributions rather than expenditures. Nevertheless, the *McConnell* Court, by focusing on political and societal developments since *Buckley*, see *id.* at __, 124 S.Ct. at 648-54, clearly rejected a static approach to campaign finance reform. Just as the *McConnell* Court deferred to Congress' "predictive judgments" about the need for federal regulation of soft-money contributions, *id.* at __, 124

the State has established that the challenged expenditure limits are supported by its compelling interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising[2] and (2) the effect that perpetual fundraising has on the time of candidates and elected officials. The evidence considered by the District Court and the Vermont legislature demonstrates that, absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility to elected officials which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, essentially requiring candidates to sell their time in order to raise campaign funds. In addition, we affirm the District Court's finding that effective campaigns can be run under Act 64's limits.

Nevertheless, although we reaffirm these aspects of our original holding, we now conclude that a remand is

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S.Ct. at 673 (observing that Congress had "been taught the hard lesson of circumvention by the entire history of campaign finance regulation"), we respect the Vermont Legislature's similar reliance—in enacting regulations on both campaign contributions and expenditures—on its substantial historical experience with campaign finance reform and its informed predictions about Vermont candidate and donor behavior.

[2] Our consideration of these issues could not help but take particular notice of the *McConnell* majority's observation, in a discussion replete with descriptions of the distinct evil of ever larger sums of money in American politics, that many of the corporate soft-money contributions at issue in that case were motivated by the "desire for access." *McConnell*, 540 U.S. at __, 124 S.Ct. at 649. The Court held that "Congress' legitimate interest" in regulating such contributions "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at __, 124 S.Ct. at 664 (citation and internal quotation marks omitted). The same issues were identified by the Vermont legislature in this case.

necessary for further fact-finding on an aspect of the narrow tailoring inquiry that was not fully considered by the District Court: the crucial question of whether Act 64's expenditure limits provision was the "least restrictive means" of furthering the State's compelling anti-corruption and time-protection interests—or whether there are other less restrictive mechanisms available that might be as effective in satisfying the compelling interests established by Vermont. On remand, the District Court should also consider another question that it did not reach in its original examination of this case—whether treating related expenditures as candidate expenditures is constitutional. We therefore leave in place the District Court's injunction, while remanding for further proceedings.

As for the remaining issues regarding Act 64's contribution limitations, our decision remains the same in all material respects. We hold that all of Vermont's provisions limiting the size of contributions survive scrutiny, including the treatment of a third party's related expenditures as contributions and the application of contribution limitations to political party donations to candidates. We thus affirm the District Court's rulings on contribution limits in part, but vacate and remand for further proceedings insofar as the District Court's injunction prohibits enforcement of the political party limit. We also vacate the judgment and remand for further proceedings on (1) whether the provisions of Act 64 regulate wholly independent expenditures by political action committees ("PACs") and, if so, whether those provisions are constitutional; and (2) the constitutionality of the law's regulation of funds transferred from national political parties to state and local party entities.

Finally, we affirm the District Court's holding that the First Amendment forbids Vermont's attempt to limit campaign contributions by non-residents to no more than 25 percent of the total contributions received. Vermont has asserted no governmental interest sufficient to justify such a

rule.

Due to the number of issues involved in this case, we set out the following table of contents:

[On advice from the Clerk's Office of the U.S. Supreme Court, the Table of Contents has been omitted as reformatting has rendered the pagination inaccurate.]

BACKGROUND

A. Act 64

In 1997, Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64" or "the Act"). As enacted, Act 64 is a comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections. Section 2805a limits the expenditures that a candidate for office may make during a two-year election cycle. Candidates for statewide office are restricted to varying amounts depending on the position sought, with a candidate for governor limited to $300,000, for lieutenant governor to $100,000, and other statewide offices to $45,000. *See id.* at § 2805a(a)(1)-(3). Candidates for governor and lieutenant governor also have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions." *See* §§ 2851-2856. Candidates for state senator and county office are limited to $4000 in expenditures, with state senators permitted an additional $2500 per seat in multi-seat districts. *See id.* at § 2805a(a)(4). Candidates for state representative in single-member districts can spend no more than $2000, and those in two-member districts no more than $3000. *See id.* at § 2805a(a)(5). Incumbent candidates may spend only 85 percent of the permitted amounts, except for incumbents of

the General Assembly who may spend 90 percent. *See id.* at § 2805a(c).

The Act also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party, or political action committee. *See id.* at § 2805(a). Slightly higher limits apply to candidates for state senate or county office ($300) and to candidates for statewide office ($400). *See id.* Political action committees and political parties may accept no contribution greater than $2000. *See id.* For the purpose of all of these contribution limits, a political party's state, county, and local branches (and national and regional affiliates of the party) count as a single unit. *See id.* at § 2801(5).

The Act further imposes limits on the source of such contributions. Although candidates, political parties, and political action committees may accept contributions from out-of-state residents and political organizations, the sum of such amounts may not exceed 25 percent of the total contributions received. *See id.* at § 2805(c).

Finally, the Act treats coordinated expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (counted against the candidate's permissible budget). *See id.* at §§ 2809(a)-(b). The Act creates a rebuttable presumption that expenditures made by political parties or political action committees that recruit or endorse candidates are related expenditures if they primarily benefit six or fewer candidates. *See id.* at § 2809(d).

The Vermont General Assembly promulgated Act 64 after extensive legislative consideration. Numerous committees considered the Act, holding over 65 hearings with more than 145 witnesses testifying. Moreover, Act 64

was the latest installment of Vermont's century-long effort to safeguard the accessibility and accountability of its elected officials.[3]

The General Assembly closely investigated the history of campaign financing for state races by examining campaign finance summaries for various Senate, House, and statewide races during the period 1978-1996, and reports of spending and contribution patterns in Vermont races. Members of the General Assembly analyzed the current status of Vermont's campaign finance law, including the disintegration of Vermont's voluntary expenditure limits. They also spoke with a range of experienced candidates and experts who provided testimony and data regarding the cost of campaigning, including the cost of travel, staff, materials, mailings, phone calls, and television and radio advertisements. Some of these witnesses described the widespread use of manipulative contribution devices, such as "bundling," which enable special interests to direct large quantities of money by way of individual contributions to particular candidates. Polls demonstrated that citizens held deep reservations and suspicions about the influence of money on the political system, particularly the influence of large contributions. Some witnesses provided testimony detailing the role that big donors have played in advocating

[3] In 1916, Vermont took early steps to ensure the accountability of its elected officials by passing direct primary elections and mandating the post-primary disclosure of candidate expenditures. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.) 4, § 1. In 1961, the legislature adopted mandatory expenditure limits in primary elections, 1961 Vt. Laws 178, and applied those limits to general elections in 1971, 1971 Vt. Laws 259. In 1976, after *Buckley*, Vermont repealed its expenditure limits but continued to limit the maximum contribution that candidates might accept. 1975 Vt. Laws (Adj. Sess.) 188. Over several decades, Vermont witnessed a period of growing disillusionment with its electoral system, and in 1993 instituted a system of voluntary expenditure limits. Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997).

or blocking particular pieces of legislation in Vermont.

The record considered by the General Assembly demonstrated how the Vermont system of unbridled expenditures has created a situation where public officials are functionally compelled to sell privileged access through the fundraising system. The Vermont legislature explained that this results in a number of related phenomena, including (1) candidates being forced to spend too much time fundraising; (2) fundraising requiring candidates to give preferred access to contributors over non-contributors; and (3) the system of increasing expenditures hindering the robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process.

The evidence adduced in those hearings also demonstrated broad and powerful support among the Vermont electorate for fundamental reform to the State's campaign financing scheme. These legislative hearings culminated in passage of the Act by an overwhelming majority and with strong bipartisan support.

Based on these hearings, reports and data, the General Assembly set forth specific findings which, in its view, indicated the need for comprehensive reform that includes contribution and expenditure limitations in Vermont electoral campaigns.

> The General Assembly finds that:
>
> (1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds.
>
> (2) Some candidates and elected officials,

particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions.

(3) In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.

(4) Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.

(5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors.

(6) In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.

(7) In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

(8) Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small group contact between candidates and the electorate and will encourage the personal

involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.

(9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.

(10) Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.

(11) Public financing of campaigns, conditioned on an appropriate number of qualifying contributions, will increase citizen participation and will limit the time spent soliciting contributions, and will reduce the need of elected officials to respond to, and provide access to, contributors. As a result candidates will be freed to devote more time and energy to debate of the issues and elected officials will be able to spend more time responding to constituents and to performing their official duties.

(12) Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.

(13) In Vermont, campaign expenditures

by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

(14) Identification of persons who publish political advertisements assists in enforcement of the contribution and expenditure limitations established by this act.

(15) Because it is essential for all candidates to have their names and positions on issues known to the electorate and because incumbents have a substantial advantage in these areas, public grants and campaign expenditures must be reduced for incumbents.

1997 Vt. Laws P.A. 64 (H. 28). On June 26, 1997, Vermont's Governor signed Act 64 into law.

B. Procedural History

The current suit was consolidated from three separate civil actions. On May 18, 1999, Marcella Landell, Donald R. Brunelle, and the Vermont Right to Life Committee, Inc., sued Vermont's Attorney General, Secretary of State and fourteen state's attorneys ("Vermont"). On August 13, 1999, Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and the Vermont Libertarian Party also brought suit, as did the Vermont Republican State Committee on February 15, 2000. The remaining defendants, including the Vermont Public Interest Research Group, the League of Women Voters of Vermont, and numerous members of Vermont's General Assembly (collectively "Defendant-Intervenors"), successfully intervened in the

consolidated action.[4]

Plaintiffs argued that the challenged provisions unconstitutionally infringe their First Amendment rights to free speech and political association.[5] The District Court held a ten-day bench trial between May 8, 2000 and June 2, 2000. An array of former and current public office holders, private citizens, and electoral experts testified about Vermont's interest in campaign finance legislation, the history of elections and campaign finance reform in Vermont, the cost of campaigning in Vermont, and the likely effect of Act 64's challenged provisions on Vermont races, candidates and political actors. As we discuss in more detail below, the ten-day bench trial resulted in the District Court's upholding most of the challenged provisions, but striking down Act 64's expenditure limitations, its limitations on contributions by parties to candidates, and its restriction on contributions from out-of-state sources. Vermont and the other defendant-appellants timely appeal from the District Court's order

[4] A previous lawsuit challenged other provisions of Act 64 which required (1) disclosure of who pays for "political advertisements" and the candidate, party or political committee "on whose behalf" the advertisement is published or broadcast; and (2) reporting of expenditures of "mass media activities . . . which included the name or likeness of a candidate for office" occurring within 30 days of a primary or general election. Vt. Stat. Ann. tit. 17, §§ 2881 - 2283. See Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2d Cir. 2000).

[5] Plaintiff Neil Randall is an incumbent representative in the Vermont legislature. Plaintiff George Kuusela is chairman of the Windham County Republican Party and has run for state legislative office. Plaintiff John Patch is chair of the Chittenden County Democratic Party and has plans to run for State Senate. Plaintiff Steven Howard was previously a candidate for State Auditor and a former state representative. Plaintiff Libertarian Party is a political party in Vermont and ran 44 candidates for office in 1998. Plaintiff Jeffrey Nelson is a longtime resident of Vermont and a financial supporter of the Republican Party. The plaintiffs also include the Vermont Right to Life Committee, the Vermont Republican State Committee, and various additional individuals.

holding those portions of Act 64 unconstitutional. Vermont is joined by *amici,* the Brennan Center for Justice at New York University School of Law and the States of Colorado, Connecticut, Maryland, New York, and Oklahoma. The plaintiffs have cross-appealed, contending that the District Court should have also enjoined the enforcement of the other disputed provisions of the Act.

C. The District Court's Decision

After receiving post-trial submissions, the District Court issued an opinion containing its findings of fact and conclusions of law. *See Landell v. Sorrell,* 118 F. Supp. 2d 459 (D. Vt. 2000). First, the District Court held that the plaintiffs have standing to challenge the subject provisions of the Act. *Id.* at 475. As to the merits, although the District Court found that Vermont had generally demonstrated several compelling justifications for Act 64's comprehensive reform of the campaign finance system, the court concluded that some of Act 64's provisions violated the First Amendment. With the exception of the expenditure limitations, the District Court applied the standard of review of "exacting scrutiny," inquiring whether the provision is narrowly tailored to serve a sufficiently important governmental interest. With regard to the expenditure limits, the District Court interpreted *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), as forbidding such limitations *per se* and held that any contrary decision would violate the doctrine of *stare decisis.* 118 F. Supp. 2d at 483. The District Court rejected the expenditure limitations despite its findings that Vermont had established several compelling interests in their favor, namely: (1) freeing office holders from the requirements of excessive fundraising so that they can perform their duties; (2) preserving faith in democracy; (3) protecting access to the political arena for those unable to access large sums of money; and (4) diminishing the importance of repetitive 30-second commercials. *Id.* at 482-83. Despite holding that the expenditure limitations are

illegal under *Buckley,* the District Court did find that the expenditure limits would permit effective campaigning. *Id.* at 471-72.

The District Court upheld the provisions imposing limitations on amounts that individuals may contribute to political campaigns, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b). The District Court found that the Vermont provision, like the statutory provision upheld in *Buckley,* served the governmental interest in preventing actual and perceived corruption in the political system. *Id.* at 476-79. As evidence of the existence of such an interest, the District Court relied on citizen polls, comments by public officials, and media accounts of citizen concern with the state of the political system, as well as direct testimony from citizens regarding their views of the political system. *Id.* at 465-70. The evidence indicated that the current financing scheme eroded public confidence in the democratic system and contributed to a waning public interest in elections. *Id.* Finally, the evidence supported the public's perception that large contributions won actual influence over the legislative process. Again, the District Court relied not only on trial testimony, but also on studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates. *Id.*

The District Court further analyzed the amounts of the contribution limitations, and held that they were narrowly tailored to serve this anti-corruption purpose. In support of the narrow-tailoring conclusion, the court relied upon the cost of previous elections in Vermont, the size of Vermont electoral districts and the corresponding cost-per-voter, the effect of the limitations on the Burlington mayoral election held after the passage of Act 64, the widely-held public view that donations in excess of the Act's limitations were suspicious, and the fact that the limitation did not inhibit "effective campaigning." *Id.* at 470-72, 476-80.

The District Court rejected the contention that PACs merit special treatment; it thus upheld the restrictions on contributions by and to PACs pursuant to Act 64. *See* Vt. Stat. Ann. tit. 17, §§ 2805 (a)-(b). If contributions by individuals may be restricted, the court reasoned, then so too may gifts by individuals to associations that in turn give funds to candidates. The District Court reasoned that Vermont has the same anti-corruption interest in limiting PAC contributions as those by individuals. The contribution limit closes a loophole which individuals could exploit to evade individual contribution limitations. *Id.* at 488-89.

The District Court held, however, that political parties deserve greater freedom in their ability to make contributions to political candidates. Although the District Court upheld the $2000 limitation on contributions to political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(a), it struck down the provision limiting contributions to candidates insofar as it applies to those candidate's own political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(b). *Id.* at 486-87. Regarding contributions to political parties, the court relied on Vermont's anti-corruption interest, noting that unrestrained contributions to parties provided a loophole to individuals wishing to evade restrictions on direct contributions. Quoting *Nixon v. Shrink Mo. Gov't PAC (Shrink)*, 528 U.S. 377, 397 (2000), the District Court found that the limit imposed by the statute is not "so radical in effect as to render political association ineffective, drive the sound of [a political party's] voice below the level of notice, and render contributions pointless." 118 F. Supp. 2d at 485. Moreover, the District Court found that, given Vermont's electoral situation, the $2000 limit did not inhibit the strength of political parties. The court relied on the evidence specifically concerning Vermont campaigns and politics, a comparison of limits on contributions to candidates in other jurisdictions, and the ability of the Republican Party to raise substantial sums while subject to Act 64's limitations. *Id.* at

484-86. The District Court, however, did not address the constitutionality of transfers of money to state and local parties from the national affiliated party, which are apparently subject to the $2000 limitation.

The District Court held that Vermont's limits on how much a political party could give to its own candidates for various state offices ($400, $300, and $200, respectively) were unconstitutionally low. *Id* at 487. The court recognized that the anti-corruption interest may justify some limitations, given that corruption may "filter[] through the party machine." *Id.* at 486. But according to the District Court, those limitations must be balanced against the special role political parties play in the American electoral system. Without much factual discussion, the court concluded that the limits would reduce the party's voice to a whisper—since political parties speak through their candidates and the restrictions were too stringent even for the small scale of Vermont's electoral races. *Id* at 487.

The District Court also upheld the treatment of state and local parties as a single entity for the purpose of calculating the contribution limitations pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5) & 2301-20. The court relied on a number of factors, including the fact that notwithstanding its adamant assertions, the defendant Vermont Republican State Committee had never acted as a loose confederation of entities in the conduct of the litigation. *Id.* at 487-88.

The District Court upheld the provision of Act 64 that treats third party expenditures "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee" as contributions to the candidate pursuant to the Act. *See* Vt. Stat. Ann. tit. 17, § 2809(a) & (c). The purpose of the provision is to close a loophole which would otherwise permit evasion of the legitimate contribution limitations by engaging in coordinated expenditures. The District Court further upheld the provision

establishing a rebuttable presumption that any third party expenditure benefitting six or fewer candidates is a related expenditure. *See id.* at 2809(d). The court explained that the presumption is a guideline to assist in compliance, and that since Vermont's Secretary of State has determined that the presumption is rebuttable, it does not unduly chill otherwise protected speech activity. *Id.* at 492. Although the District Court upheld the provision treating related expenditures as contributions to candidates, it struck down the provision treating related expenditures as expenditures by candidates. Vt. Stat. Ann. tit. 17 § 2809(a) & (b).

The District Court found unconstitutional the provision that caps out-of-state funds at 25 percent of total contributions received by a candidate, political party, or PAC pursuant to Vt. Stat. Ann. tit. 17, § 2805(c). The court found that the factual record did not establish any legitimate governmental interest in limiting such contributions. *Id.* at 483-84. Instead, the record only supported an inference that such contributions raise the risk of corruption when they are large—a problem solved by the contribution limits. The fact that a donor is a resident of another state is not an important factor in either increasing the risk of corruption or the public's perception of corruption. Moreover, the mechanics of the ban indicated a lack of proper tailoring because it acts as a complete bar to contributions by some would-be contributors.

Finally, the court held that, under Vermont law, the unconstitutional provisions may be severed from the rest of Act 64. *Id.* at 492-93.

DISCUSSION

As a threshold matter, the defendants have challenged the plaintiffs' standing to assert this facial challenge to Act 64's expenditure and contribution limitations. In order to present a "case or controversy" within the meaning of Article III of the Constitution, the plaintiffs

seeking relief must have a sufficient "personal stake in the outcome of the controversy." *Buckley v. Valeo,* 424 U.S. 1, 11 (1976) (internal quotation marks omitted). The District Court provided careful analysis demonstrating that each of the challenged provisions arguably affects the First Amendment rights of one or more of the plaintiffs. *See Landell v. Sorrell,* 118 F. Supp. 2d 459, 474-76 (D. Vt. 2000). For the reasons set forth by the District Court, we uphold its determination that the plaintiffs have standing to assert their challenge to Act 64's expenditure and contribution limits.

Although we review the District Court's factual findings for clear error pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, *see Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 498 (1984), the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review. Indeed, the breadth of review of factual issues is greater in cases raising First Amendment issues: "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-286 (1964)). The appellate court must also be vigilant for errors of law that "may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp.,* 466 U.S. at 501.

In reviewing campaign finance regulations, "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." *Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 161 (2003) (internal quotation marks omitted). Campaign contributions advance political association by allowing one to affiliate with a political candidate, and "enabl[ing] like-minded persons to pool their resources in furtherance of common

political goals." *Buckley,* 424 U.S. at 22. However, restrictions on contributions have been treated as merely "marginal" speech restrictions because contributions "lie closer to the edges than to the core of political expression." *Beaumont,* 539 U.S. at 161. As a result, contribution limits pass muster if they are "closely drawn to match a sufficiently important interest." *Id.* at 162 (citations and internal quotation marks omitted). And, as the Supreme Court recently observed, its cases "have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell,* 540 U.S. at __, 124 S.Ct. at 660; *see also id.* at __, 124 S.Ct. at 657 n.40 (explaining that since *Buckley,* the Court has "consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption") (collecting cases).

However, "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 440 (2001) *(Colorado Republican I); see also McConnell,* 540 U.S. at __, 124 S.Ct. at 655. The Supreme Court has treated limits on campaign spending as a direct restraint on speech, and thus, expenditure limits must be narrowly tailored to serve a compelling state interest. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657 (1990) (addressing corporate expenditures).

With these standards in mind, we review each of the challenged provisions in turn.

I. Act 64's Expenditure Limitations

A. The Rule of *Buckley*

Buckley v. Valeo remains the seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations. 424 U.S. 1

(1976). The *Buckley* Court considered and rejected a variety of expenditure limitations, including a ceiling on independent, campaign-related expenditures, a ceiling on a candidate's use of personal or family resources, and a ceiling on a candidate's campaign expenditures. Like the federal statute reviewed in *Buckley,* Act 64 limits the total amount of campaign funds that a candidate may spend.

Although the clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny, the District Court in this case (and it is by no means alone) apparently felt that *Buckley* categorically prohibits expenditure limitations. *See, e.g., Homans v. City of Albuquerque,* 366 F.3d 900, 914-21 (10th Cir. 2004); *Kruse v. City of Cincinnati,* 142 F.3d 907, 918-19 (6th Cir.), *cert. denied* 525 U.S. 1001 (1998); *see also post* at **[7], [9], [25], [55], [88]** (Winter, dissenting). We disagree. The *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress' purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits. 424 U.S. at 55-58. Ultimately, the Court concluded that the federal government had failed to assert any sufficiently important interest that its expenditure limitations served. *See id.* at 55.

Examining the federal government's interest in eliminating corruption from federal elections, the *Buckley* Court concluded that the government's asserted rationale only applied to large contributions—that is, eliminating large contributions fully satisfied the government's anti-corruption interest. *See id.* at 56-57. The federal government claimed that expenditure limitations were necessary to make contribution limitations easier to enforce, arguing that when candidates cannot spend large quantities of money, they have a weaker incentive to accept illegally large contributions. But the Court concluded that the contribution limitations promised to be sufficiently effective on their own. *See id.* Based on the Court's review of the record, "[t]here [was] no

indication that the substantial criminal penalties" attached to violations of contribution limits, as well as the "political repercussion of such violations," would not suffice to realize this anti-corruption interest. *Id.*

Nor was the Court persuaded that the federal government had a sufficient interest in utilizing expenditure limitations to equalize the financial resources of candidates competing for office. *See id.* at 56-57. The contribution limits would assure that any difference in resources "var[ies] with the size and intensity of the candidate's support." *Id.* at 56. Finally, the Court addressed the argument that expenditure limitations served the federal government's interest "in reducing the allegedly skyrocketing costs of political campaigns." *Id.* at 57. The Court rejected the idea that the state had a sufficient interest in setting the appropriate scope of the "quantity and range of debate on public issues in a political campaign." *Id.* In other words, *Buckley* held that large campaign expenditures, in and of themselves, are not inherently suspect.

We conclude, then, that Vermont cannot sustain Act 64 by asserting a need to control excessive campaign spending *per se*. But critically, the *Buckley* Court did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits. *Id.* at 55. Accordingly, after *Buckley,* there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

We are not alone in concluding that *Buckley* does not permanently foreclose any consideration of campaign expenditure limitations. In *Shrink,* Justices Breyer, Ginsburg

and Stevens all recognized that our post-*Buckley* experiences with campaign finance have demonstrated that we need a flexible approach to the constitutional review of campaign finance rules. Justice Breyer, who was joined by Justice Ginsburg, concluded that courts must resist a static reading of *Buckley*'s mandate, which may require reinterpretation in light of subsequent experience, including a legislature's "political judgment that unlimited spending threatens the integrity of the electoral process." 528 U.S. at 403-04 (Breyer, J., concurring). Legislatures may protect the electoral process not only from quid pro quo corruption, but also from the threat that campaign funding may pose to the "integrity of the electoral process." *Id.* at 401. Justice Stevens also articulated the need for "a fresh reexamination" of *Buckley,* and concluded that "Money is property; it is not speech." *Id.* at 398 (Stevens, J., concurring). And although Justice Kennedy argued from a different perspective that the post-*Buckley* experience requires a wholesale abandonment of the approach adopted in *Buckley,* he too left open the possibility that "Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions thus permitting officeholders to concentrate their time and effort on official duties rather than on fundraising." *Shrink,* 528 U.S. at 409 (Kennedy, J., dissenting); *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 745 (Kennedy, J., concurring in part and dissenting in part) (indicating by implication that *Buckley* did not make expenditure limits *per se* invalid).[6]

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[6] Unease with *Buckley* is not limited to those who argue that campaign finance regulations have a proper place in our constitutional system. In Shrink, Justices Thomas and Scalia both advocated overruling *Buckley* not to give legislatures greater leeway to pass needed campaign finance reform, but to heighten the constitutional review given to contribution limits. 528 U.S. at 410-12 (Thomas, J., joined by Scalia, J., dissenting); see also *McConnell*, 540 U.S. at __, 124 S.Ct. at 737 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy has expressed sympathy for their view. Shrink, at 409-10 (Kennedy, J., dissenting); cf.

Indeed, some judges have noted that reconsideration might be required were a court faced with compelling evidence that unlimited expenditures posed great dangers to the very political process that *Buckley* sought to safeguard. Justices Stevens and Ginsburg have supported the constitutionality of spending limits on political parties for, among other reasons, the likelihood that such limits would improve, rather than inhibit, a flourishing political system:

> It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 649-50 (1996) *(Colorado Republican I)* (Stevens, J., dissenting). In part, they reached this conclusion because of the comparative competency of

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McConnell, 540 U.S. at __, 124 S.Ct. at 755-56 (Kennedy, J., concurring in part and dissenting in part) (characterizing *Buckley*'s "unworkable" distinction between limits on contributions and limits on expenditures as having created an "awkward and imprecise test").

More recently, in their respective *McConnell* dissents, Justices Scalia, Kennedy and Thomas observed with dismay that the *McConnell* majority went even further than the Court had gone in *Buckley*. See *McConnell*, 540 U.S. at __, 124 S.Ct. at 729 (Scalia, J., concurring in part and dissenting in part) (characterizing the majority as "having abandoned most of the First Amendment weaponry that *Buckley* left intact"); *id.* at __, 124 S.Ct. at 742 (Kennedy, J., concurring in part and dissenting in part) ("To reach today's decision, the Court surpasses *Buckley*'s limits and expands Congress' regulatory power."); *id.* at __, 124 S.Ct. at 730 (Thomas, J., concurring in part and dissenting in part) (accusing the majority of building upon the errors of *Buckley* by "expanding the anticircumvention rationale beyond reason"). Hence, it would be unrealistic for us to fail to notice the Court's expanding views.

> the different branches of government: "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Id.* at 650. Moreover, one judge sitting on the Sixth Circuit has pointed out that *Buckley* was "decided on a slender factual record" and that a fuller record might satisfy the constitutional requirement that expenditure limits be narrowly tailored to a compelling interest. *Kruse,* 142 F.3d at 919 (Cohn, J., concurring); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-27, at 1133 n.1 (2d ed. 1988) ("One consequence of th[e] expedited review [in *Buckley]* was that the Supreme Court, working in a factual vacuum, was forced to indulge in more than a little empirical speculation about such issues as the circumvention of expenditure limits and the impact of those limits on campaign speech."); Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform,* 37 WASHBURN L.J. 1, 30 (1997) ("Since the *Buckley* Court's judgment was made without the benefit of a factual record, critics have argued that it is time for a factually based study of the potential for corruption inherent in large, independent expenditures."); David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process,* 61 Brook. L. Rev. 1347, 1357 (1995) ("The Supreme Court granted certiorari in *Buckley v. Valeo* without either party to the action having the opportunity to develop a strong factual record on which the Court could base its ultimate decision. Thus, the Court faced the issue of Congress's power to regulate campaign expenditures purely on theoretical grounds, without the benefit of developing an adequate factual record.") (citing BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 469-70 (1979)).

The academic literature also contains persuasive analyses that our post-*Buckley* understanding of campaign finance requires a careful evaluation of the evidence in support of expenditure limits. *See, e.g.,* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning*

of the End of the Buckley Era?, 85 MINN. L. REV. 1729, 1765-69 (2001) (arguing that fair and competitive elections may require some form of expenditure limitations); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1288-89 (1994) (noting that changed circumstances and never-before considered governmental interests, including the protection of candidates' time, might be sufficiently compelling to support expenditure limits).

Although we recognize that there is considerable dissatisfaction with *Buckley*'s approach, we still premise our conclusions on the assumption that *Buckley* continues to govern the constitutional review of campaign finance laws. However, we do not accept an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional, because such a static approach to *Buckley*'s import would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy.[7] In sum, like the federal expenditure limitations considered in *Buckley*, Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest. It is to that question that we now turn.

B. The Requisite Level of Scrutiny

As a regulation of the amount that a candidate can spend on speech made "for the purpose of influencing an election," Vermont's expenditure limits are a content-based

[7] The arguments to the contrary that are raised by the dissent largely reprise those presented by Senator Buckley and like-minded commentators in the early 1970s. While some of those arguments were then successful, they failed to result in having the Supreme Court hold that expenditure limits are *per se* unconstitutional—a fact that our dissenting colleague disputes.

restriction on speech. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (treating election provision as content-based because "whether individuals may exercise their free speech rights . . . depends entirely on whether their speech is related to a political campaign").[8] "Content-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and the government bears the burden of rebutting that presumption. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). To uphold a content-based restriction on speech, the government must prove the existence of a compelling state interest to support the restriction, and that the restriction is narrowly tailored to advance that interest.

In the context of expenditure limits, then, the level of scrutiny applied is akin to the "strict scrutiny" standard frequently employed in the equal protection context, in terms of the required degree of "fit" between means and ends. *Cf.* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 112-13 n.94 (citing cases) (noting that, traditionally, judicial review has been at its strongest in protecting against infringement on First Amendment rights). Our application of this standard is informed both by the particular First Amendment right implicated by the challenged

[8] Some scholars think that such regulations are more properly classified as "content-neutral." See, e.g., Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413, 517 n.151 (1996) ("I treat the expenditure ceilings in *Buckley* as content neutral, as is the norm, because they cover spending for expression supporting all political candidates. It could be argued, however, that the ceilings imposed a subject-matter limitation because they applied only to spending in political campaigns.") (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-27, at 1132-36 (2d ed. 1988)).

restrictions, as well as by the degree of deference owed to the supporting legislative findings.

Turning to the first of these factors, there is no doubt that "[p]olitical speech is the primary object of First Amendment protection." *Shrink,* 528 U.S. at 410-11 (Thomas, J., dissenting). Moreover, in our representative democracy, the free exchange of political information "should receive the most protection when it matters the most—during campaigns for elective office." *Id.* at 411. However, the precise object of First Amendment protection in this case, for most plaintiffs, is the ability to spend money on political speech—not the speech itself. *See Shrink,* 528 U.S. at 400 (Breyer, J., concurring) (money is not speech; it *"enables* speech"). To be sure, the Supreme Court has consistently held that the expenditure of money is so critical in enabling political speech in today's mass society, that it should receive the same First Amendment protection as the speech itself. We do not question this proposition—and indeed apply it in this case—but, particularly in light of at least one Supreme Court Justice's willingness to rethink the money equals speech equation (J. Stevens concurring in *Shrink,* 528 U.S. at 398), think it important to define the protected interest as precisely as possible.

Although most of the plaintiffs are persons or organizations that want to spend money on speech, plaintiff Marcella Landell is a voter who wants to receive political speech. Her First Amendment right to receive such speech is the equivalent of the right of the speakers. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976) (the First Amendment protection afforded is to "the communication, to its source and to its recipients both"). As Landell describes her interest in her brief, she "does not wish her ability to cast a wise and informed vote to be restricted by the State of Vermont imposing a direct barrier on the amount of candidate speech she may receive." Restrictions of political

speech that "hamstring[] voters seeking to inform themselves about the candidates and the campaign issues" are unconstitutional. *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223 (1989). Plaintiffs argue that this high level of protection, as applied in *Buckley,* dictates that the expenditure limit provision must automatically be struck down.

On the other hand, Vermont appears to argue that deference to the legislature—on whether the interests asserted in favor of expenditure limits are compelling, and whether expenditure limits are necessary to achieve these goals—is warranted. Vermont cites several Supreme Court cases in support of its view of legislative deference, including *Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 210 (1982) (it is improper to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665 (1994) *(Turner I)* ("courts must accord substantial deference to the predictive judgments" of the legislature); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 196 (1997) *(Turner I)* ("We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power."); and *Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 330-31 n.12 (1985) (Congress' factual findings are entitled to "a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on" an issue). Indeed, the District Court concluded that "[a]lthough legislative findings are not entirely isolated from review," it was "required to exercise considerable deference to such findings." 118 F. Supp. 2d at 476 (citing *Turner II).* Accordingly, the court adopted the fifteen official findings excerpted *supra* and in the District Court opinion, but made clear that it was also considering the other evidence presented at trial. *Id.* at 468-74.

As to plaintiffs' position, we disagree that the high level of protection accorded political speech or the money enabling it dictates that the provision must automatically be struck down. *Cf. McConnell,* 540 U.S. at __, 124 S.Ct. at 706 ("Many years ago we observed that '[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.'") (quoting *Burroughs v. United States,* 290 U.S. 534, 545 (1934)); *Storer v. Brown,* 415 U.S. 724, 729-30 (1974) (compelling interest in the integrity and stability of the election process means that "every substantial restriction on the right to vote or to associate" should not automatically be invalidated). In our view, this level of protection is the starting point, not the endpoint, for scrutiny of Vermont's expenditure limits.

Indeed, the Supreme Court has been clear in its rejection of the view that "strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 519 (1980) (Marshall, J., concurring)) (explaining that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases"). This observation has proven true in the First Amendment context, as the Supreme Court has validated a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See, e.g., Burson v. Freeman,* 504 U.S. 191 (1992) (plurality opinion) (upholding state ban on electioneering activity near polling places); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (upholding statute restricting independent expenditures by corporations on campaigns). Careful analysis is particularly important in applying strict scrutiny, where, as Justice Breyer has put it, "a law significantly implicates competing constitutionally protected interests in

complex ways." *Shrink,* 528 U.S. at 402 (Breyer, J., concurring). As we will explain, this is a case where "constitutionally protected interests lie on both sides of the legal equation," preventing a simple equation of strict scrutiny with constitutional infirmity. *Id.* at 400; *see also, e.g., Burson,* 504 U.S. at 199 (plurality opinion) (recognizing compelling interest in preserving integrity of electoral process); *id.* at 213 (Kennedy, J., concurring) ("[T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."); *Storer,* 415 U.S. at 736 (allowing some restrictions on ballot access in order to further the "State's interest in the stability of its political system").

Nor should we adopt total legislative deference as the appropriate level of scrutiny. Deference to legislative findings may well be warranted on certain issues relating to the constitutionality of election-related laws, such as the precise level of contribution limits, as in *Buckley,* 424 U.S. at 30, or whether 100 feet, as opposed to 50 or 75 feet, is an adequate radius surrounding a polling place to ban electioneering, as in *Burson,* 504 U.S. at 209-10. Some degree of deference on the issue of whether there are state interests that justify legislative changes to the State's electoral system may also be appropriate. *See, e.g., Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 155 (2003) ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages."). But total deference is not warranted on the core questions of whether those interests are truly compelling enough, in a constitutional sense, to justify the expenditure limits, and whether this regulation places an undue burden on the First Amendment rights of those who bring this challenge. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 519 (1981) (plurality

opinion) ("[I]t has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgment in this area . . .. "); *Schneider v. State,* 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . [T]he delicate and difficult task falls upon the courts . . . to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.").

We read the District Court opinion as consistent with this view. It gives "considerable deference" to the legislative findings on the need for the law only, but not to the legislature's assessment of whether its solution is narrowly tailored. *Cf. Regents of University of California v. Bakke,* 438 U.S. 265, 299 (1978) (Powell, J.) ("Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant.") (quoted in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224-25 (1995)). This approach is consistent with Justice Breyer's concurrence in *Shrink,* where he indicated that the Court should "defer to [the Missouri legislature's] political judgment that unlimited spending threatens the integrity of the electoral process," but not with respect to whether "its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge." 528 U.S. at 403-04.

Although we bear in mind Justice Breyer's observations in *Shrink,* we cannot adopt his conclusion, in light of the extensive Supreme Court precedent to the contrary, that the interests must be balanced here, and that there is therefore "no place" for a "strong presumption against constitutionality of the sort often thought to

accompany the words 'strict scrutiny.'" *Id.* at 400. Such a presumption is proper, at least until the Supreme Court tells us otherwise, and it means that the burden of persuasion at trial was on the State to defend Act 64—*i.e.,* to establish that there was a compelling state interest to support the expenditure limit provision and that the provision was narrowly tailored to advance that interest. *See Burson,* 504 U.S. at 226 (Stevens, J., dissenting, joined by O'Connor and Souter) (noting that "a core premise of strict scrutiny" is that "the heavy burden of justification is *on the State")* (emphasis in original). But this burden does not excuse the courts from actually applying the scrutiny that the First Amendment demands, and the State of Vermont deserves.

Therefore, although we do not question the validity of the factual findings developed by the legislature in support of Act 64,[9] our system of judicial review provides plaintiffs the opportunity to present competing evidence, assigns to the District Court the responsibility for making findings of fact and conclusions of law after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess the legal significance of these factual findings. This responsibility is particularly important here, where, as plaintiffs claim, complete deference to the legislature could "risk such constitutional evils as permitting incumbents to insulate themselves from effective electoral challenge." *Shrink,* 528 U.S. at 402 (Breyer, J., concurring.)

Put differently, this level of scrutiny is a serious barrier for expenditure limits, but it is not impenetrable. Rather, an independent court must be convinced that the legislature was serving the people's interest and not its own. *See, e.g., Burson,* 504 U.S. at 213 (Kennedy, J., concurring)

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[9] *See, e.g., City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989) (plurality opinion) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.") (citing *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488-89 (1955)).

(discussing the use of the compelling-interest test as "one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law") *(quoted in R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992)); *Cf. Croson,* 488 U.S. at 493 (noting in the equal protection context that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," with the narrow tailoring analysis helping to ensure that there is "little or no possibility that the motive for the classification was illegitimate").

C. Compelling Interests

In *Shrink,* the Court indicated that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S. at 391. For example, the Court in *Shrink* accepted a relatively minimal evidentiary showing of Missouri's interest in preventing corruption or the appearance thereof, because in its view, there was "little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 395; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 661 ("The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible."). Similarly, the *Shrink* Court relied in large part on *Buckley* 's conclusion on the fit between contribution limits and the anti-corruption interest, to decide that the contribution limits in Missouri were sufficiently tailored and not "so different in kind as to raise essentially a new issue about the adequacy of the Missouri statute's tailoring to serve its purposes." 528 U.S. at 395.

With *Shrink*'s guidance on "the quantum of empirical evidence needed" in mind, we turn then to the interests asserted by Vermont in support of Act 64's expenditure limits to assess whether any of the interests might be sufficiently compelling to support this regulation of political speech. Vermont offers five interests that it argues are sufficiently compelling to support the spending limits on candidates: (1) "avoiding the reality and appearance of corruption in elective politics and government"; (2) "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties"; (3) promoting "electoral competition and in protecting equal access to political participation"; (4) "bolster[ing] voter interest and engagement in elective politics"; and (5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Defendants-intervenors appear to rely primarily on the first two of these interests to support the spending limits—describing those interests as (1) deterring corruption and the appearance of corruption; and (2) permitting candidates and officeholders to spend less time fund-raising and more time interacting with voters and performing duties. Defendants-intervenors also argue that the third interest asserted by the State—"protecting political equality"—should be recognized as an "additional basis" to support the spending limits on candidates.[10]

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[10] Amicus Brennan Center for Justice, arguing in favor of the spending limits, relies on the interest of "prevent[ing] the demonstrably corrosive effects of uncontrolled campaign spending on the democratic process." Amicus further characterizes "uncontrolled campaign spending" as a problem that "harms the quality of democratic representation," that is "undermining faith in the democratic process," and that "has a harmful impact on voter turnout." Amici States rely on the first three interests identified by Vermont, and also relied upon by intervenors, described as (1) "eliminat[ing] corruption and the appearance of corruption in the

We now consider the interests asserted by the defendants.

1. Anti-Corruption

The Supreme Court has recently clarified that the anti-corruption interest, in the campaign finance context, is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389; *see also McConnell*, 540 U.S. at __, 124 S.Ct. at 660. Moreover, the *Shrink* Court reiterated that, in addition to the *actual* influence of campaign contributions on politicians' behavior, the *perception* of corruption was an important part of this compelling state interest because it "could jeopardize the willingness of voters to take part in democratic governance." *Shrink*, 528 U.S. at 390 (citing *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (democracy works "only if the people have faith in those who govern")).

In terms of "the quantum of empirical evidence needed," we note that although the interest in avoiding corruption and the appearance thereof is well-established as sufficiently important in the context of contribution limits, the rejection in *Buckley* of the anti-corruption interest as a constitutional justification for spending limits dictates the need for considerable evidence to demonstrate that unlimited spending is part of the corruption problem, and that spending limits are a necessary and plausible solution.

In this case, the District Court found that Vermont

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political process"; (2) "ensur[ing] that officeholders can spend less time fund-raising and more time performing their duties" and (3) "bolster[ing] equal access to political office and restor[ing] the public's confidence in the electoral system."

had proven that the reality and perception of corruption in its political system was a legitimate concern. Specifically, it found that "[e]vidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics," and "it appears they have reason to feel that way," 118 F. Supp. 2d at 468, concluding that "[t]he record suggested that large contributors often have an undue influence over the legislative agenda." *Id.* In light of *Shrink*, this "undue influence" over the legislative agenda is properly considered part of the anti-corruption interest. *See* 528 U.S. at 389.[11] For the reasons that follow, our independent review of the evidence supports these findings by the District Court.

First, citizens in Vermont have consistently demonstrated a belief that the attention of their public representatives may be available for a price. As a result, public faith in the democratic system has declined. The General Assembly described the effects of a need to raise ever growing amounts of funds: "Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." 1997

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[11] Reiterating points it had already made in *Buckley* and Shrink, the Supreme Court in *McConnell* clearly held that large campaign donations—even the so-called "soft-money" contributions at issue in *McConnell*—"can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders." *McConnell*, 540 U.S. at __, 124 S.Ct. at 661. The *McConnell* majority observed that during the 1996 and 2000 campaigns, "more than half of the top 50 soft-money donors gave substantial sums to both major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." *Id.* at __, 124 S.Ct. at 663 (emphasis in original); see also *id.* at __, 124 S.Ct. at 649 (citing evidence that "many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties").

Vt. Laws P.A. 64 (H.28) (finding No. 4). "Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." *Id.* (finding No. 9). At trial, one expert witness, Celinda C. Lake, concluded that "[v]oters are extremely concerned about the influence of special interests in the political process." In fact, according to polling data, nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government, and more than two thirds believe that "large corporations and wealthy individuals have too much influence." (expert report of Celinda C. Lake).

Testimony by Vermont's elected officials revealed that this disenchantment and loss of public faith played a critical role in their belief that expenditure limits are necessary. One sponsor of Act 64, Representative Karen Kitzmiller, presented the Vermont House of Representatives with evidence showing that 94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would "reduce the power of special interest groups." Another state legislator, Gordon Bristol, testified at trial about his concern "about the regular guy on the street, and I think if they feel that candidates are spending a modest amount of money, that they are going to get candidates in there who are representing issues and not a special interest . . . ." According to another legislator, citizens have reported that they do not vote because "'[a]ll the big money controls everybody in Montpelier anyways.' . . . They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." (testimony of Elizabeth Ready). Another legislator said: "[I]t's the monied interests that control the process, and that cynicism . . . it keeps people from

participating, from engaging . . . ." (testimony of Donald Hooper).

Second, because of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds. The General Assembly described the effects of a need to raise ever growing amounts of funds: "Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors." 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5). If legislation alienates one major special interest group, officials are reluctant to alienate others because the number of entities and people making political contributions is finite and small. One state legislator admitted that, when considering a piece of legislation, "You have to initially consider it as whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." (testimony of Peter Smith). One candidate recalled being told by another lawmaker: "We've already lost the drug money [because of the pharmacy bill], and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." (testimony of Cheryl Rivers).

Third, and perhaps most perniciously, the demands of fundraising also affect the behavior of elected officials in the context of agenda-setting, since officials pay attention to which contributor "wants what to happen in terms of language of the bill, in terms of calendaring the bill, in terms of writing the rules." (testimony of Peter Smith). That same witness also noted that a crucial part of any deliberation on a bill involves speculation about the reaction of contributors because they control the money: politicians are forever

asking "what's the industry position, what's the union position, what's—you know, and what they're talking about is where [is] the money behind the issue, what does the money want, where is the conflict between and among the power brokers." Senator Rivers testified that campaign contributors, by virtue of their role as contributors, can dominate the attention of party leadership or a committee chair, and thereby influence the legislature's agenda. In her words, "there is kind of an atmosphere that is created that there is [an] assumption that phone calls [of contributors] will get taken and [their] policy issues will be considered." Another senator, Elizabeth Ready, recognized that "there is an agenda out there that is pretty much set by folks that are not elected."[12] Candidates, often with great reluctance, accept the bargain with contributors so that they do not lose large sources of potential fundraising for the "arms race" in

[12] This phenomenon was also chronicled by the *McConnell* Court, which quoted one former Senator as admitting that members of Congress "have limited amounts of time" but do make themselves available to meet with those who give "large sums." *McConnell,* 540 U.S. at __,124 S.Ct. at 664 (citations and internal quotation marks omitted). The same former Senator went on to explain that those meetings are "not idle chit-chats about the philosophy of democracy . . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." *Id.* at __, 124 S.Ct. at 664-65 (citations and internal quotation marks omitted).

Our dissenting colleague criticizes Vermont's reliance on this type of anecdotal evidence but the Supreme Court expressly credited similar testimony in *McConnell* where, as here, the record was "replete" with anecdotal examples of the type of access-peddling that concerned Congress. *McConnell,* 540 U.S. at __, 124 S.Ct. at 664. The *McConnell* Court specifically observed the type of "particularized evidence of improper influence" required by our dissenting colleague, *post* at **[101]**, would be particularly hard to come by. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." *McConnell,* 540 U.S. at __, 124 S.Ct. at 666.

which they feel compelled to participate.

The evidence at trial established that candidates for public office rely on special interests for financial support, produced directly or by way of "bundling" smaller contributions from a particular company or industry.[13] The *Buckley* Court seemed to assume that many small contributions could not raise the specter of corruption. "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?" 424 U.S. at 56 n.64 (internal quotation marks omitted). But the reality of campaign financing in Vermont is a far cry from this idyllic vision of political fundraising, in large part because not every voter has the financial ability to participate by giving campaign contributions. "[T]he average Vermonter has been,

[13] Although Judge Winter criticizes Act 64's proponents' reliance on the phenomenon of "bundling" or "pooling" contributions as a justification for the legislation, see post at [89-93], we note that the *McConnell* Court lauded Congress' similar efforts to anticipate, document, and respond to candidates', donors' and parties' evolving strategies for circumventing existing campaign finance reforms. See *id.* at __, 124 S.Ct. at 661 ("[T]he First Amendment does not require Congress to ignore the fact that candidates, donors, and parties test the limits of the current law.") (citation and internal quotation marks omitted). Indeed, for example, no sooner had the *Buckley* Court construed federal law to cover "express advocacy," did the political spending system create "issue advertising." See *id.* at __, 124 S.Ct. at 650-52. Similarly, elaborate schemes involving the "solicitation, transfer, and use of soft money" grew out of FECA's imposition of limitations on the source and amount of contributions of "federal" or "hard" money. *Id.* at __, 124 S.Ct. at 648-50. The *McConnell* Court recognized that such new developments—and Congress' general awareness of the realities of campaign fundraising—quite correctly had moved Congress to legislate. See *id.* at __, 124 S.Ct. at 665-66. Clearly, bundling practices allow donors to achieve indirectly what contribution limits prevent them from doing directly. We do not diminish the legislature's reliance on this concern because, like the Supreme Court, we refuse to take a "crabbed view of corruption, and particularly of the appearance of corruption." *Id.* at __, 124 S.Ct. at 665.

to some degree, disenfranchised because the average Vermonter cannot afford the price of admission." Senate J. of the State of Vt., at 1338 (Biennial Session, 1997) (statement of William T. Doyle).

Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates. The evidence at trial demonstrated that money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power. *See Jacobus v. Alaska,* 338 F.3d 1095, 1113 (9th Cir. 2003) (describing the phenomenon of "access-peddling" and explaining that it "creates a danger of corruption and the appearance of corruption"). The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system.

In our view, such influence of campaign contributors is pernicious because it is bought. Certain private citizens and organizations should not be given greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns. Even with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns. Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it.

In short, we believe, based on the District Court's findings and our own independent review of the record, that Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending. And we believe that the factual record developed by Vermont in support of the anti-corruption interest, through the legislative process and at trial, may be sufficient to distinguish *Buckley. Cf. Colorado Republican I,* 518 U.S. at 617-18 (plurality opinion) (indicating that "the lack of coordination between the candidate and the source of the expenditure . . . prevents us from assuming, *absent convincing evidence to the contrary,* that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.") (emphasis added); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 863-64 (1992) (citing *West Coast Hotel and Brown v. Board of Education* as examples of "applications of constitutional principle to facts as they had not been seen by the Court before"). Nonetheless, given *Buckley*'s holding rejecting the anti-corruption interest as inadequate to support the expenditure limits at issue in that case, we are reluctant to conclude that the same general interest, standing alone, is sufficiently compelling to support Act 64's expenditure limits. *See Buckley,* 424 U.S. at 46-48; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 647. We turn then to the second interest asserted by defendants.

2. Time Protection

Vermont also submits that it has a compelling interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties." Indeed, the District Court found that "the need to solicit money from large donors at times turns legislators away from their official duties." 118 F. Supp. 2d at 468. The District Court also indicated that the State proved that this concern exists, and that Vermont's

expenditure limits addressed this interest, among others. *Id.* at 482-83

Again, we are mindful of *Shrink*'s guidance that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[14] 528 U.S. at 391. On this score, the "time protection" rationale has been recognized as compelling, although not in the context of candidate spending limits. Indeed, the *Buckley* Court considered this interest in assessing, and deemed it sufficiently important to support, the public financing scheme for Presidential election campaigns—a provision it upheld. *See* 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions") (citing Senate Rep. No. 93-689); 424 U.S. at 91 ("Congress was legislating for the 'general welfare' . . . to free candidates from the rigors of fundraising."). *See also Republican Nat'l Committee v. Federal Election Comm'n,* 487 F. Supp. 280, 284-86 (S.D.N.Y.) (three-judge District Court) (upholding constitutionality of expenditure limits as condition of accepting presidential public financing in part on ground that it would "give candidates the opportunity to lessen the 'great drain on (their) time and energies' required

[14] Amicus Brennan Center also points to evidence nationally that "raising necessary campaign funds has turned into a full-time job for many candidates and officeholders." And there is consensus among the five amici states—including Connecticut and New York—that "[a]lthough the States have a compelling interest in ensuring that the demands of fundraising not drain elected officials of the time and attention necessary to carry out their official duties, they are not succeeding." We find it significant that all three states that make up our Circuit have expressed concern over the all-consuming nature of unrestrained fundraising.

by fundraising 'at the expense of providing competitive debate of the issues for the electorate'") (quoting Senate Rep. No. 93-689), *aff'd* mem., 445 U.S. 955 (1980).

Moreover, other circuits have more recently recognized the compelling nature of the time-protection interest in similar contexts. *See Rosenstiel v. Rodriguez,* 101 F.3d 1544, 1553 (8th Cir. 1996), *cert denied,* 520 U.S. 1229 (1997) (upholding Minnesota's voluntary public financing scheme because the government has a compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 39 (1st Cir. 1993) (holding that statute survives exacting scrutiny because Rhode Island has "a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising.") (quoting *Buckley,* 424 U.S. at 91). Indeed, the *Rosenstiel* court determined that it is "well settled" that this interest is compelling. 101 F.3d at 1553 (collecting cases).

The *Buckley* Court, in determining that the expenditure limits in that case were unconstitutional, alluded to this time-protection interest only in passing. 424 U.S. at 91, 96 (mentioning generally Congress' desire to relieve political candidates from the "rigors" of soliciting and fundraising); *see also* Blasi, *supra,* at 1285-86 & n.15 ("[D]uring the public and legislative debates that led to the passage in 1974 of mandatory spending limits for congressional races, and during the *Buckley* litigation which resulted in the invalidation of those limits, candidate time protection was almost wholly ignored as a justification for campaign spending limits."). Only Justice White, concurring in part and dissenting in part, observed that imposing "expenditure ceilings" would "ease the candidate's understandable obsession with fundraising, and so free him

and his staff to communicate in more places and ways unconnected with the fundraising function. *Buckley,* 424 U.S. at 264-65 ("There is nothing objectionable—indeed it seems to me to be a weighty interest in favor of the provision—in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money."). One commentator explains that "candidate time protection was not at the center of either the reform agenda or the constitutional analysis" because *Buckley* was decided"[b]efore the advent of pervasive war chests and candidate-PAC merchandizing bazaars."[15] Blasi, *supra,* at 1287.

Plaintiffs argue that this interest is no different than the goal of reducing the "skyrocketing costs of political campaigns," rejected by *Buckley* as an insufficiently compelling interest to support expenditure limits. 424 U.S. at 57. The Sixth Circuit agreed in *Kruse,* reasoning that "[t]he need to spend a large amount of time fundraising is a direct outgrowth of high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." 142 F.3d at 916-17. We are unpersuaded by this reasoning.

Indeed, we think the language of *Buckley,* as well as an examination of the *Buckley* briefs, oral argument, and subsequent commentary from judges and scholars, precludes such an interpretation. In its discussion of the federal campaign expenditure ceilings at issue in *Buckley,* the *Buckley* Court explained that the limits "appear to be

[15] Moreover, *Buckley* could not have anticipated the whole range of individual concerns faced by specific states, such as Vermont, given those states' unique experiences with state-level campaign finance reform in the three decades since *Buckley* was decided.

designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns," and cited the statistics put forward by appellees and appellants on how the percentage increase in campaign spending in recent years compared to the rise in the consumer price index, gross national product, and total expenditures for commercial advertising over the same time period. 424 U.S. at 57. The Court concluded that, regardless of the import of such statistics, "the mere growth in the cost of federal election campaigns *in and of itself* provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." *Id.* (emphasis added). Particularly in light of the recent statements of three Justices indicating that this "time protection" rationale may be a compelling interest, *see supra* at **[25-26]** (quoting *Shrink,* 528 U.S. at 409 (Kennedy, J., dissenting); and *Colorado Republican I,* 518 U.S. at 649-50 (Stevens, J., joined by Ginsburg, J., dissenting)), we see no reason to read *Buckley* more broadly than its language indicates.

At trial, Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office. In particular, there is strong evidence that unlimited expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests. The Vermont General Assembly found that such fundraising by candidates requires an "inordinate[] amount of time." 1997 Vt. Laws P.A. 64 (H.28) (finding No.1). The large, and growing, campaign war chests in Vermont have created strong pressures on elected officials to ensure that they can raise funds comparable to any opponent. One witness, former State Senator and Lieutenant Governor Peter Smith, described the "stampede or nuclear arms race mentality that we currently have, which is just keep building

the bank because you never know what's going to happen." Under the current system, Vermont candidates feel like "you had two races you were running. The first was for the money . . . ." (testimony of Donald Hooper).

Although there may be no inherent problem with candidates competing to raise large quantities of funds, the evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time. Special interests, well placed to take advantage of candidates' fear of losing this fundraising war, dominate candidates' time and thereby have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly consuming the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions. This command of available time, inherent in endless fundraising, drastically reduces opportunities that candidates have to meet with non-contributing citizens.[16]

Legislators explained at trial that officials are more likely to return donors' phone calls. "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call then I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access." (testimony of Elizabeth Ready). A former candidate for Congress and current lobbyist in Vermont, Anthony Pollina, described the process:

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[16] The General Assembly minced no words when describing this phenomenon: "Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions." 1997 Vt. Laws P.A. 64 (H.28) (finding No.2).

> [C]andidates and policymakers . . . can only talk to so many people in a day. They can only respond to so many phone calls. The governor can only have so many meetings in a day. And if in fact large contributors are using their contributions to buy access to the governor or other policymakers . . . then that means that the policymaker, the governor and others are not spending their time talking to other people who have not provided other large contributions. . . .

Nor is this just a theoretical concern. One widely reported case involved the differing access that state officials granted to interested groups as the state government considered whether to label milk produced using genetically engineered hormones. Major dairy companies, who in the past had been contributors, were able to arrange meetings with critical state leaders, whereas local farmer organizations that lacked importance as contributors could not arrange similar meetings.

By giving money, contributors "haven't bought the person, but they have certainly bought a piece of that time there where they have that person's attention." (testimony of Elizabeth Ready). Even if candidates receive valuable information during every hour spent fundraising, their time is being controlled by those with campaign cash, and this effect is corrosive. The Vermont legislature considered one article in the Burlington Free Press stating that "[m]oney not only threatens to corrupt the process, it sabotages the political dialogue as well. Candidates spend too much time begging for dollars and too little time talking issues . . . ." *See Democratic Process Relies on Reform,* Burlington Free Press, Oct. 6, 1997 at 6A.

Public officials testified at trial that the financial necessity imposed by fundraising, and bred by the "arms race" mentality in campaigns with unlimited spending,

requires that elected officials spend time with donors rather than on their official duties. One state Senator testified that legislators have to spend time at party fundraising events to give donors access to elected officials. (testimony of Cheryl Rivers). Another Senator explained how spending limits would affect her time:

> If I can go out and raise what I have to raise and know that those limits are in place, I can spend the whole rest of my campaign, once I have raised that money, out with the public, okay. I can go door-to-door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere
>
> making fundraising calls. (testimony of Elizabeth Ready).

Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors. And the public understands this reality: at trial, Vermont presented survey data that 85% of Vermonters are concerned that "political fundraising took away time from important government business." (testimony of Celinda C. Lake).

Indeed, although we do not balance interests, the fact that this time-protection interest is itself fundamental to our representative democracy, and related to First Amendment values, cannot be ignored. As one First Amendment scholar put it, the quality of democratic representation suffers "when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views." Blasi, *supra*, at 1282-83.

Unfortunately, without spending limits, the contribution limits would exacerbate the time problem. A lobbyist who supports Act 64 noted that contribution limits coupled with unlimited expenditures would require that candidates "continue to spend more time and energy raising those smaller contributions to see who could raise the most money and outspend their opponent and therefore win the race. So the spending limits, tied to the contribution limits, create a situation where the candidates simply don't have to spend as much time and energy raising money. . . . [The limits] change the way campaigns are run, in a sense, and make them more people oriented or voter oriented as opposed to fundraising oriented . . . ." (testimony of Anthony Pollina). *Cf. McConnell,* 540 U.S. at __, 124 S.Ct. at 656 ("The 'overall effect' of dollar limits on contributions is 'merely to require candidates and political committees to raise funds from a greater number of persons.'") (quoting *Buckley,* 424 U.S. at 21-22). That same lobbyist also explained that with contribution limits alone, "the unfortunate thing is that candidates would feel compelled to look for those other sources because they would still be trying to outspend . . . their opponents, and that would cause them to then spend more time and more energy into looking for those other sources of funding. It might then encourage the bundling practices that were referred to earlier, and . . . it would not address the problem that we are hoping to address." (testimony of Anthony Pollina).[17]

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[17] Our dissenting colleague challenges our deference to the Vermont legislature with respect to its predictions about the effect that Act 64's contribution limits, standing alone, would have on candidate behavior. See post at [97-108]. Such "predictive judgments" by a legislature, however, should be accorded "substantial deference . . . , particularly when, as here, those predictions are so firmly rooted in relevant history and common sense." *McConnell*, 540 U.S. at __, 124 S.Ct. at 673 (citation and internal quotation marks omitted); see also supra at [46

In sum, our independent review of the evidence adduced at trial supports the District Court findings that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters," and that "the need to solicit money from large donors at times turns legislators away from their official duties." 118 F. Supp. 2d at 468, 470. So long as the danger remains that a political opponent might severely outstrip a candidate's financial resources, candidates have continued to feel it necessary to raise ever larger sums of money. For elected officials, this will mean giving more time to contributors over non-contributors, and expending more effort on relatively generous contributors over less important ones.

3. Conclusion: Two Compelling Interests

Faced with this evidence and the resulting findings of the District Court, we conclude that Vermont has established at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials. In this case, Vermont's well-documented interest in time-protection is particularly compelling when considered in tandem with the State's firmly-rooted interest in preventing corruption (or the appearance thereof). *Cf. Miller v. Johnson*, 515 U.S. 900, 921 (1995) (leaving open question whether "compliance with the [Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination").[18] Regardless of

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n.14] (noting the consensus among the amici states that this time-protection interest is not unique to Vermont).

[18] It further appears that the two interests analyzed here—anti-corruption and time protection—overlap and might be better described as one interest—"to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action." *Shrink*, 528 U.S. at 401 (Breyer, J.,

whether one finds Vermont's justifications novel, the quantum of evidence demonstrating the depth of the problem in Vermont campaigns is great. The drive for campaign funds has created a situation where candidate time is effectively for sale. As a democracy, Vermont has a compelling interest in ensuring that its representatives' time is not available only—or mostly—to the people who are willing and able to pay for it. Fundamentally, Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money. Vermont's interest in ending this state of affairs is compelling: the basic democratic requirements of accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.

Because we conclude that Vermont has established two interests that, taken together, are sufficiently compelling to support its expenditure limits, we need not consider the other interests asserted by the State. Specifically, we need not consider whether the interest in encouraging electoral competition and protecting the ability of non-wealthy Vermonters to run for state office in Vermont is sufficiently compelling. And we do not need to reach the question of whether Vermont has sufficiently compelling, independent interests in (1) bolstering voter interest and engagement in elective politics; and (2) encouraging public debates and other forms of meaningful constituent contact in place of the

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concurring), or, as amicus Brennan Center puts it, to "protect the quality of democratic representation." Since defendants did not defend Vermont's law on the basis of such an interest, however, and the Supreme Court has not relied on such an interest in its recent analyses of the constitutionality of campaign finance laws, we do not explicitly assess that interest here. We do note that this interest appears to underlie, in part, both of the interests asserted by the State—anti-corruption and time protection for candidates and elected officials—that we do analyze.

growing reliance on 30-second commercials. We do note that the first of these interests is properly considered part of the anti-corruption interest, and the second relates to the time-protection rationale.

D. Narrow Tailoring

Our analysis next requires a determination as to whether the particular limits are narrowly tailored to serve the compelling interests offered. Because mandatory expenditure limits are so rare, and the Supreme Court and federal courts of appeals that have considered the constitutionality of expenditure limits have found no compelling interests sufficient to support them, no court has reached the narrow tailoring question in this context. Thus, we are in largely uncharted waters.

Plaintiffs argue that even if there is a compelling interest to support Act 64's spending limits, the spending limits are not narrowly tailored. They argue that the spending limits are too serious an impingement on First Amendment rights, without significantly advancing the interests asserted by the State. Because the District Court held that mandatory spending limits are *per se* unconstitutional under *Buckley,* it never fully reached the narrow tailoring inquiry, although it did address the subsidiary question of whether candidates could run effective campaigns under the rubric of "narrow tailoring." 118 F. Supp. 2d at 470-72.

The parties present the narrow tailoring issue as whether the expenditure limits are sufficiently high to allow candidates to run effective campaigns. Indeed, in our initial consideration of this case, we assumed that the parties were correct in focusing the narrow tailoring question on the ability of a candidate to run an "effective campaign." We now believe, however, that the narrow tailoring inquiry is broader, and that answering the question requires remand to the District Court. We write further to explain the nature of the narrow tailoring inquiry required.

The narrow tailoring inquiry examines the "fit" between means and ends. Here, the question is whether mandatory spending limits will significantly advance the State's time-protection and anti-corruption interests, without severely burdening the First Amendment rights of the plaintiffs. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 265 (1986).

In order to satisfy the "narrow tailoring" standard, the government must also prove that the mechanism chosen is the least restrictive means of advancing that interest. *See, e.g., Playboy Entertainment Group, Inc.,* 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *Universal City Studios, Inc. v. Corley, 273* F.3d 429, 450 (2d Cir. 2001) ("Content-based restrictions are permissible only if they serve compelling state interests and do so by the least restrictive means available.").[19] When the First Amendment demands strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entertainment Group* , 529 U.S. at 813; *Sable Communications of Cal., Inc., v. FCC,* 492 U.S. 115,

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[19] One commentator has described the Supreme Court's narrowly tailoring requirement this way: "The narrow-tailoring prong, then, involves essentially factual questions about whether the law is indeed narrowly drawn: Does the law further the interest; is the law limited to speech that implicates the interest; does the law cover all such speech; are there less restrictive alternatives that will serve the interest equally well?" Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2424 (1996) (footnotes omitted).

126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."); *see also Boos v. Barry,* 485 U.S. 312, 329 (1988) (concluding that government regulation at issue was not narrowly tailored because "a less restrictive alternative is readily available"); *California Democratic Party v. Jones,* 530 U.S. 567, 585-86 (2000) (observing, in dicta, that California's "blanket" partisan primary system was not a narrowly tailored means of furthering asserted state interests because "a *nonpartisan* blanket primary" would advance the same interests "without severely burdening a political party's First Amendment right of association").

Accordingly, answering the narrow tailoring question requires addressing three different issues: (1) the extent to which the State's interests are advanced by the regulation; (2) the extent to which candidates can conduct "effective advocacy" under the limits; and (3) whether the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights.

1. Are Vermont's time-protection and anti-corruption interests advanced by campaign spending caps?

Plaintiffs argue that the spending limits do not actually advance the interests asserted by the State because the limits are set at the equivalent of current levels of spending, and when considered in combination with the contribution limits, actually force candidates and elected officials to spend more time and attention on fundraising, not less. For the reasons that follow, we disagree and conclude that the spending limits are likely to advance both the time-protection and anti-corruption interests asserted by the State.

First, we do note the apparent tension between seeking to reform the political process by imposing expenditure limits, yet setting limits based on current candidate expenditure patterns in an effort to approximate the spending needs of such candidates. We believe, however, that this tension is more apparent than real. Indeed, plaintiffs' argument misunderstands the driving force behind the spending limits. The evidence at trial, including the evidence from legislative hearings, indicated the widespread presence of an "arms race" mentality. The record in Vermont demonstrates that often it is this potential of being vastly outspent that creates powerful and deleterious pressures to raise funds. The significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating this potential of being vastly outspent that leads to the "arms race" mentality among candidates and elected officials.

Limiting the arms race promises to have a direct impact on the time of candidates and elected officials. Indeed, the witnesses' testimony at trial supported the idea that reducing the arms race mentality, spending limits would allow candidates and elected officials to focus more time on issues. One elected official shared her sense of how spending limits will liberate public officials: "[The spending limit] lessens the pressure. . . . I am not going to be locked away . . . in the Democratic Party somewhere or in my own office somewhere making fundraising calls." (testimony of Elizabeth Ready). Another State Senator, and a sponsor of Act 64, testified that "I would hope that it's going to give folks running for office more of an opportunity to go out and engage the voters on the issues." (testimony of Cheryl Rivers). And William T. Doyle, another senator, testified that without the need to raise such large sums of money "there will be increased time for real debate . . . candidates will be able to concentrate more on issues rather than raising public money."

The "arms race" mentality—and its effect on the behavior of candidates and elected officials—is also quite relevant to the anti-corruption interest, and helps explain why the spending caps also address this "threat from politicians too compliant with the wishes of large contributors." *Shrink,* 528 U.S. at 389. The evidence presented at trial indicated that the agenda of candidates and elected officials is affected by the perceived need to raise increasing amounts of funds. Because the sources of campaign money are necessarily limited, candidates are reluctant to alienate potential fundraising constituencies. This affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed. With spending caps, this calculus changes to a certain extent. For example, with a limit on how much money can be spent, elected officials testified that they would be more willing to take a position which a particular industry opposed. (testimony of State Sen. Cheryl Rivers; testimony of former Congressman and Lt. Governor Peter Smith).

Plaintiffs also argue that Act 64's expenditure limits do not advance the interest in reducing the time dedicated to fundraising because Act 64, as a whole, actually forces candidates to devote more time to fundraising, not less. Defendants essentially do not dispute that lower contribution limits increase the amount of time that candidates must spend on fundraising. Instead they argue that this makes the interest in time-protection more compelling, not less, with respect to expenditure limits. In essence, plaintiffs argue that rather than address both the anti-corruption interest with contribution limits, and the anti-corruption and time-protection interests with expenditure limits, the State of Vermont must address just one interest, or else resign itself to the state of affairs post-*Buckley*. After *Buckley,* when the Court upheld the contribution limits but not spending limits, Congress' regulatory scheme fell prey to precisely this problem:

candidates have been forced to spend increasing amounts of time fundraising under a regime with contribution limits but no spending limits. We reject the notion that Vermont cannot try to address both interests—anti-corruption and time-protection—at once.

Finally, plaintiffs argue, as the *Buckley* plaintiffs did for contribution limits, that the "limitations work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face." 424 U.S. at 30-31. We agree with plaintiffs—and with our dissenting colleague, *see post*—that election laws, written by legislators who are, at least in part, necessarily self-interested, must be scrutinized for indications that the limits unduly benefit incumbents or otherwise create dangerous distortions of the electoral system. *See Shrink,* 528 U.S. at 402 (Breyer, J., concurring) (noting the need for courts to scrutinize legislative judgments that "risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge."). It should be recognized, however, that a legislature's inaction may maintain such barriers more easily than reforms create them, and review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the reforms they are enacting. *See* Frank I. Michelman, *The Constitutional Question,* 24 HARV. J.L. & PUB. POL'Y 17, 22 (2000).

Indeed, there is considerable evidence in Act 64 itself that incumbent protection was not the legislature's motive. Act 64 permits challengers to outspend incumbents, partially neutralizing the advantages that incumbents often enjoy from free media exposure. Specifically, incumbent candidates for statewide office may only spend 85 percent of the amount permitted challengers. *See* Vt. Stat. Ann. tit. 17, § 2805a(c). Incumbents in the General Assembly may spend 90 percent. *See id.* These are rare types of provisions in state campaign

finance laws; if the legislature wanted to achieve incumbent protection, it seems unlikely that they would have inserted such provisions. Moreover, defendants presented evidence at trial that the disparity between challenger and incumbent spending is what most frequently disadvantages challengers, and reduces electoral competition—a disparity that spending limits would inevitably reduce. (Testimony of Donald Gross) In short, plaintiffs have not demonstrated that challengers will be disproportionately harmed by the spending limits. Like the *Buckley* court, we see no evidence in the record sufficient to overcome the presumption that "a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." 424 U.S. at 31.

In sum, because Vermont has demonstrated that the time-protection and anti-corruption interests are advanced, and plaintiffs have not succeeded in demonstrating impermissible legislative motives, we conclude that the State has met its burden on this aspect of narrow tailoring—that the spending limits actually advance these asserted interests.

2. Do spending limits at these levels allow for "effective advocacy"?

We must then turn to the question of whether the spending limits prevent "effective advocacy" by limiting the ability of candidates to communicate adequately with voters, and the ability of voters to receive the information they need to make a choice on election day. This "effective advocacy" requirement is drawn from the caselaw on whether contribution limits are sufficiently high. *See McConnell,* 540 U.S. at __, 124 S.Ct. at 655-56 ("Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary

for effective advocacy.'") (quoting *Buckley,* 424 U.S. at *21); Shrink,* 528 U.S. at 395-96 (same). Although the concept of "effective advocacy" originated with regard to the freedom of association rights rooted in the First Amendment, *see NAACP v. Alabama,* 357 U.S. 449, 459-60 (1958), the Supreme Court has also used this concept in assessing candidates' claims that campaign finance regulations place too great a burden on their First Amendment speech rights. In *Shrink,* for example, one of the plaintiffs was a candidate for statewide office who argued that Missouri's contribution limits prevented him from "amassing the resources necessary for effective advocacy." 528 U.S. at 396 (quoting *Buckley).* We believe that the use of this "effective advocacy" standard is appropriate here as a threshold consideration in assessing whether the expenditure limits are "narrowly tailored," as the parties have argued. [20]

Discussing the nature of this "effective advocacy" analysis in the context of contribution limitations, the Court asked in part whether the limitation was "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." *Shrink,* 528 U.S. at 397; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 677. The nature of the "effective advocacy" requirement, then, is that of a constitutional minimum; as long as the regulation does not "drive the sound of a candidate's voice below the level of notice," based on evidence from past campaigns, then the First Amendment is not violated on this ground.

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[20] We note that examination of other forms of expenditure limits has often involved analysis of effective advocacy and campaigning. For example, the ability of corporations to communicate an effective political message, despite a state ban on the use of general treasury funds for candidate-oriented independent expenditures, was noted in Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) ("We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views.") (emphasis added).

Although the District Court never reached the legal issue of narrow tailoring, it did make findings as to whether "effective campaigns" could be run under the limits. The District Court found that Vermont's expenditure limitations reflect the actual cost of running for office in Vermont, would not cause a revolutionary change in campaign spending, and would leave candidates fully capable of conducting effective campaigns. 118 F. Supp. 2d at 472. These conclusions are subject to a mixed standard of review, consistent with Rule 52(a) of the Federal Rules of Civil Procedure but also bearing in mind the obligation in First Amendment cases for appellate courts to make an independent examination of the record as a whole. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984); *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 688 (1989); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 780 (2d Cir.), *cert. denied,* 502 U.S. 1013 (1991).

Based on the data presented at trial through expert witnesses, the District Court found that the average spending in Vermont House district races during the three election cycles preceding the District Court's opinion was almost uniformly below the limits set pursuant to Act 64. 118 F. Supp. 2d at 471. Similarly, multi-member Senate districts all involved average spending below that permitted pursuant to Act 64, with average spending exceeding the Act's expenditure limits only in single-member Senate districts. *Id.* In addition to reflecting the actual expenditures in Vermont elections, the District Court found that Act 64's expenditure limits are also appropriate given the costs of running for office in Vermont. The District Court credited the testimony of a number of fact witnesses who testified to the details of previous campaigns they had run, including a Senate challenger in Chittenden County and a former Senate candidate in Rutland County, "confirm[ing] that fully effective campaigns for the Vermont Senate can be run under

the limits established by Act 64." *Id.* at 472. The court noted that Vermont candidates for legislative office frequently use low-cost campaigning methods, such as community debates, door-to-door campaigning, town barbecues and suppers, advertising placards and the issuance of press releases. *Id.* Legislative candidates rarely hire campaign staff or purchase expensive mass media. *Id.* Indeed, the evidence at trial indicated that most Vermont House and Senate candidates do not use television advertising primarily because the lack of congruence between media markets and district boundaries render such advertising an inefficient and ineffective way to communicate with voters. (Ex. AA, Landell Admission #49; Ex. BB, Randall Admission #84, #85; testimony of Neil Randall; testimony of Toby Young; Ex. U-1, Expert Report of Anthony Gierzynski, at 8.) Nonetheless, candidates are able to spend the money needed to ensure that their voice is well above "the level of notice" necessary for "effective advocacy." *Shrink,* 528 U.S. at 397.

Although candidates for statewide office utilize more expensive media and techniques, they are permitted to spend larger amounts and can thus also engage in "effective advocacy." In part, this reflects the particular qualities of Vermont, especially the relatively inexpensive cost of television advertising in the State. 118 F. Supp. 2d at 472. In reaching this conclusion, the District Court rejected testimony of plaintiffs' witnesses that much larger amounts of money—amounts so large that no Vermont candidate has ever spent them—are required to wage an effective campaign for governor or other statewide offices. *See id.* ("The Court rejects [the witness's] testimony that it is necessary to spend between $800,000 and $1 million to run an effective campaign for Governor of Vermont . . . Nor does the Court accept that candidates must spend approximately $500,000 in order to run effective campaigns for Lieutenant Governor and the other lower statewide offices of Secretary of State, Treasurer, Auditor, and Attorney General.").

And though conflicting evidence was presented at trial, there was ample evidence aside from the specific statistics and campaigns cited in the District Court opinion to support the District Court's effective campaign findings. For example, plaintiffs' evidence emphasized what they described as the problems under the limits for candidates running for Senate in Chittenden County, a county that includes the city of Burlington, as well as very rural areas. But defendants presented evidence that the average spending in this district was consistently far less than the $16,500 allowed under Act 64. More specifically, defendants presented evidence that in 1994, all six of the victorious candidates in Chittenden County spent at or near the Act 64 spending limits, including two successful challengers. In 1996, all six winners spent at or below the limits, including three successful challengers. And in 1998, three of the six candidates spent below the limits. As to statewide races, one candidate for State Auditor in 2000, Elizabeth Ready, indicated that under the $45,000 limit for her race, she had been able to purchase newspaper and radio ads, and considered using television advertising later in the race.

Plaintiffs may not simply rely on the highest-spending races in order to declare the entire statute unconstitutional on its face. In *Shrink,* the Supreme Court went as far as to assume the truth of plaintiff's claim that the contribution limits affected his ability "to wage a competitive campaign," and concluded that nonetheless, "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley."* 528 U.S. at 396. Indeed, certain plaintiffs have a particularly difficult time arguing that the spending limits will burden their First Amendment rights. Plaintiff Donald Brunelle's maximum expenditure in any of his past House campaigns was $1,007, and plaintiff George Kuusela has never spent more than $1,550. The new limits allow each of them, as challengers, to spend $3,000 in

their House campaigns, significantly more than they have spent in the past.

In *Shrink,* the Supreme Court relied on and quoted the District Court's conclusions, made on cross-motions for summary judgment, that "candidates for state elected office [have been] quite able to raise funds sufficient to run effective campaigns," and that "candidates for political office in the State are still able to amass impressive campaign war chests." 528 U.S. at 396 (citations omitted). Like the *Shrink* Court, we affirm the District Court's conclusion, here made after a 10-day bench trial, that candidates can meet the threshold level of "effective advocacy" when running for office in the State of Vermont. 118 F. Supp. 2d at 471-72. After independent review, we agree with the District Court that these expenditure limits are not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice," *Shrink,* 528 U.S. at 397, and therefore the limits do not prevent candidates from "amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. However, as we address in the next section, the inquiry into how much the spending limits impinge First Amendment rights is broader than it was in the *Shrink* contribution limits context, and therefore must go beyond merely "effective advocacy."

3. Are mandatory expenditure limits the least restrictive means of advancing the State's interests?

The greater level of scrutiny accorded spending limits, as compared to contribution limits, requires that Vermont must also prove that Act 64's mandatory expenditure limit system is the least restrictive alternative for achieving the State's compelling time-protection and anti-corruption interests. This inquiry is essentially twofold. First, the State must prove that the *typ e* of regulation chosen was the least restrictive—that is, that no other type of regulation could

have advanced the interests asserted while impinging less on First Amendment rights. Second, the least restrictive alternative inquiry requires scrutiny of the basis for the particular spending limits chosen—an inquiry not undertaken with respect to contribution limits. In evaluating the constitutionality of contribution limits, the Supreme Court has indicated that "[i]f it is satisfied that some limit . . . is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," noting that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30. In the context of expenditure limits, and in light of the legislative history of Act 64, there may well be "differences in kind" as to the choice of specific spending limits that demand scrutiny.

a. *Type of Regulation*

Vermont argues that it "had already explored less restrictive alternatives and found them to be ineffective." Specifically, in 1993, the State instituted a system of voluntary expenditure limits. Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997). Under this system, candidates had the option of signing an affidavit indicating that they would comply with the spending limits and, in exchange, received any favorable or unfavorable publicity from that decision. At trial, Vermont presented evidence that the voluntary spending limits in place from 1993 to 1997 were not working. Participation in the voluntary system fell dramatically each year, with 90 percent of candidates participating in the first year but less than 20 percent in the second year. Witnesses testified that Vermont's voluntary limits did not work because candidates attempted to gain an advantage in the fundraising "arms race" by ignoring the limits. Most tellingly, by 1998, not a single candidate for statewide office chose to abide by the voluntary expenditure limits.

Vermont's voluntary limits were quite different, however, than many of the voluntary spending limits in other states.[21] In Vermont, the only "carrot" exchanged for the voluntary agreement to the limits was the ability to publicize one's compliance. Most other states (and New York City) offer additional incentives such as public matching funds, a higher contribution limit, or other inducements. *See, e.g.*, WRITING REFORM: A GUIDE TO DRAFTING STATE AND LOCAL CAMPAIGN FINANCE LAWS, V-8-19 (Deborah Goldberg ed., Brennan Center 2001) (describing variety of mechanisms used by states to encourage compliance with voluntary limits). And many of these types of provisions have been upheld by the federal courts of appeals in the face of a First Amendment challenge. *See e.g. Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552-53 (8th Cir. 1996) (upholding Minnesota's voluntary public financing scheme), *cert. denied*, 520 U.S. 1229 (1997); *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (holding that Rhode Island's voluntary public financing statute survives exacting scrutiny).

Indeed, this type of spending limit—voluntary, but with public funding as an inducement to comply—was in Act 64 as originally introduced in the House, but the provision appears to have been changed to mandatory in one of the House committees. (Ex. A, at E-0001, 0031.) It is unclear from the current record why this change occurred,

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[21] Voluntary campaign expenditure limitations of one sort or another have been promulgated by governments in Hawaii, Kentucky, Maine, Maryland, Michigan, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *See, e.g.*, Haw. Rev. Stat. § 11-219 (2003); Ky. Rev. Stat. Ann. § 121A.030 (2003); Me. Rev. Stat. Ann. tit. 21-A § 1125 (2003); Md. Code Ann. Elec. Law § 15-105 (2003); Mich. Comp. Laws Ann. § 169.267 (2003); Minn. Stat. § 10A.25 (2003); N.H. Rev. Stat. Ann. § 664:5-b (2003); R.I. Gen. Laws § 17-25-20 (2003); Wis. Stat. Ann. § 11.31 (West 2003) (enforcement enjoined by *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002).

and the District Court made no findings on this point. Similarly, it is possible that the Vermont legislature could have employed a public financing option for all offices, in addition to the option that was provided for Governor and Lieutenant Governor candidates. *See, e.g.,* General Accounting Office, *Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates,* (May 9, 2003) (GAO-03-453) (assessing initial results of public funding of legislative candidates in Maine and Arizona). Notably, early versions of the bill appear to have contained such funding for a broader range of offices. (testimony of Karen Kitzmiller; Ex. 70, at E-2828.) On the other hand, after the voluntary affidavit system broke down, the legislature may have concluded that only mandatory expenditure limitations, together with contribution limitations, would adequately advance the State's interests. Indeed, there may have been still other reasons—not yet made part of the record—for the legislature's decision not to adopt, for all offices, voluntary expenditure limits with public funding incentives.

If Vermont could have utilized some of the same voluntary mechanisms employed by other states, offering either financial or other incentives for compliance with expenditure limits, then Vermont may not be able to prove that it employed the least restrictive alternative. *Cf. Denver Area Educational Telecommunications Consortium v. FCC,* 518 U.S. 727, 758 (1996) ("[W]e can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful).") (emphasis in original). On remand, the District Court should make findings as to whether there were less restrictive alternatives available that could have been as effective in advancing the asserted interests. *See Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986) (alternatives should serve the interest "'about as well'").

Should there be proven another type of regulation that would have similarly advanced the interests asserted, while impinging less on First Amendment rights, the District Court will have a basis to find that the provision is not narrowly tailored.

b. *Basis for Spending Cap Limits*

If the District Court finds, however, that mandatory spending limits were the only type of regulation that could sufficiently advance Vermont's time-protection and anti-corruption interests, then the court must also inquire into the basis for the particular amount of the spending limits chosen. There was evidence presented at trial that Act 64's spending limits were intended to map onto existing spending levels from past campaigns. In defendants' proposed findings of fact after trial, defendants indicated that the legislature "considered factors such as population, historical information on past spending levels and campaigns, Vermont's previous voluntary spending limits, and the testimony of numerous witnesses concerning the appropriate level for the limits, with the legislature balancing different viewpoints as is necessary with most pieces of legislation." This is consistent with the District Court's findings that the average spending on past races was consistently under the limits imposed by Act 64. 118 F. Supp. 2d at 471-472. *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?,* 85 MINN. L. REV. 1729, 1769 (2001) (suggesting that median spending levels of candidates in recent races could be an appropriate basis for spending limits).

Nonetheless, the specific basis for the final limits is not entirely clear from the existing record. Defendants noted that for the Governor's race, the Senate bill would have set a $250,000 limit, while the House bill originally set a $400,000 limit. In the final bill as adopted, the limit was set at $300,000. Similarly, the limits for one-seat Senate races

varied in the various committee bills, either $4,000, $5,000 or $6,000, with an additional $2-3,000 for each additional seat in the district. The final limits were those that emerged out of the Senate Finance Committee (the lowest in any of the committee bills)—$4,000 plus an additional $2,500 for each additional seat. Such decisions, of course, could be the product of typical legislative compromise—a process into which we will not intrude. However, plaintiffs also presented evidence that the ultimate decision as to the amount of certain statewide spending limits was motivated by a desire to preserve the public fisc, because of Act 64's public financing option for gubernatorial and Lieutenant Governor candidates.[22] Particularly in the context of expenditure limits, these choices demand greater scrutiny.

Thus, in undertaking its "least restrictive means" analysis on remand, the District Court should make additional findings on the impact of the legislative choices as to the appropriate spending limits on candidates' and voters' First Amendment rights. Even if Act 64's spending limits are sufficiently high to permit "effective advocacy" as defined in *Shrink,* as the District Court found and as we have affirmed, the precise level of the limits chosen can have a significant impact on how "restrictive" the provision is on First Amendment rights. Of course, a $2 million limit for State Senate races is quite unlikely to restrict First Amendment rights, but equally unlikely to impact the "arms race" mentality and thereby advance the interests asserted. Moreover, there will always be "distinctions in degree" that could be seen as less restrictive—$305,000 is "less restrictive" than $300,000; $310,000 "less restrictive" than $305,000, etc. And such an inquiry has no logical endpoint.

[22] We draw no conclusions at this stage about whether such a reason would be constitutionally acceptable.

However, the specific choices made by the Vermont legislature among the different spending limits contained in various bills may be "differences in kind" with respect to the impact on the First Amendment rights of candidates and voters. Inquiries into the First Amendment impact of challenged regulations have been undertaken in analogous contexts by other courts, *see, e.g., National Black Police Ass'n v. D.C. Board of Elections and Ethics,* 924 F. Supp. 270, 277 (D.D.C. 1996) (considering a variety of factors in assessing whether the reduction in campaign funds was "so substantial that it affected the candidates' ability to reach voters"), vacated as moot *sub nom. National Black Police Ass'n v. District of Columbia,* 108 F.3d 346 (D.C. Cir. 1997), and, although necessarily speculative here, should be undertaken on remand. If the choice of the lower spending limit—for example, $4,000 for a Senate race as opposed to $6,000—is significantly "more restrictive," while no more effective in advancing the interest asserted, then the lower spending limit is not consistent with the First Amendment. Assessing the legislative alternatives, then, requires evaluating both (1) the extent to which the higher spending limit is "less restrictive" of the First Amendment rights of candidates and voters[23]; and (2) the extent to which the higher spending limit would be as effective in advancing the anti-corruption and time-protection interests. The answers to these questions will determine whether the spending limits

[23] In addition, our dissenting colleague asserts that Act 64's definition of "expenditures" and "related expenditures" may mean that the spending totals for past campaigns understate the amount of expenditures as defined by Act 64. He also points out that the legal and record keeping costs of compliance with the new law will also inflate future candidates' expenditures. See post at [56-58]. Findings in this regard will also help inform the inquiry on the degree to which this provision impinges on First Amendment rights.

chosen not only allow for "effective campaigns" but also are the "least restrictive alternative," and therefore narrowly tailored.

E. Conclusion: Remand for Further Findings

Quite simply, the District Court found that effective campaigns can be waged under Act 64's stated limits, and we agree. But the District Court did not examine, because it found spending limits *per se* unconstitutional, whether the legislature might have chosen either another type of regulation besides mandatory spending limits, or higher limits, that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters.[24] *Cf. Turner Broadcasting System, Inc. v. FCC,*

[24] The dissent asserts that this least restrictive means inquiry is a "mixed issue of legislative fact and law" that does not require remand. See post at [132]. The dissent's extensive discussion of the significance of the distinction between adjudicative and legislative facts seems to us tangential and unhelpful. The fact that this Court may ultimately undertake de novo review of any legislative facts found by the District Court on remand or that appellate courts take judicial notice of legislative facts under appropriate circumstances, see *id.*, does not mean that we must resolve disputed legislative facts—particularly facts that are dispositive of the case before us—on an insufficiently developed record. Nor should we, under these circumstances, take judicial notice of facts relating to Vermont's political and electoral system, an arena in which this Court lacks substantial experience or expertise. By contrast, the types of "legislative facts" that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves. See, e.g., United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir.) (citations omitted), cert. denied, 515 U.S. 1127 (1995).

Judge Winter's fundamental disagreement with our opinion seems not to be one of appropriate characterization of facts. Rather, his dispute with our position is that he believes that a remand is unnecessary because there is nothing more to be learned. Obviously we disagree. There are gaps in the record—likely the result of the District Court's abridged consideration of the issue of narrow tailoring—that ought be filled before any court undertakes to resolve the ultimate issue in this case: whether

512 U.S. 622, 668 (1994) (remanding, after grant of summary judgment, "to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions" in part because "the record fails to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests") (quoting *Sable Communications of Cal., Inc., v. FCC,* 492 U.S. 115, 129 (1989)). As to the amount of the limits, there obviously comes a point where limits would be set so high as to have no impact on the interests sought to be protected. We need, however, to hear from the District Court on this fact-intensive question of whether that point is as set in Act 64 or appreciably higher.

On remand, the District Court ought consider, along with any other issues relating to narrow tailoring that it and the parties deem relevant: (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.[25] Based on its fact-finding on

there are less restrictive alternatives that could have advanced Vermont's compelling interests.

[25] Our dissenting colleague criticizes these guidelines for further inquiry on several grounds, none of which we find persuasive. At the outset, he asserts that the first two queries are simply straightforward questions of legislative history. See post at [134-35]. Unfortunately, as noted supra at [67-70], the answers to these questions are not discernible from the existing record. To the extent that the dissent is suggesting that these questions are irrelevant, see post at [139-40], we disagree.

these issues, the District Court will be able to draw a legal conclusion as to whether Vermont's legislature chose the "least restrictive alternative" for advancing its interests, and therefore whether the expenditure limits are narrowly

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We reject the suggestion that we are overly focused on what the legislature *did*. Of course, the ultimate issue for the District Court on remand is whether there exists a less restrictive type or degree of regulation that would serve Vermont's compelling anti-corruption and time-protection interests; it is not merely whether the legislature considered such an alternative. See supra at [67-73]. Because our dissenting colleague concludes, without citation, that "a combination of public and private financing with low contribution limits is infinitely less restrictive . . . and accomplishes all of the ostensible purposes of Act 64's expenditure limits," he deems a remand unnecessary. See post at [140]. We, however, do not believe that proposition to be self-evident, nor is it supported by the current record.

We are loath to presume, on an incomplete record, the reasons for the legislature's decision not to pursue such alternatives and we believe the District Court's—and perhaps eventually this Court's—evaluation of whether less restrictive alternatives exist will undoubtedly be aided by the legislature's own analysis of those alternatives, to the extent such analysis occurred. Indeed, even a modicum of deference to the legislature and consideration for principles of federalism would seem to require consideration of its reasons for rejecting a potentially-less-restrictive alternative scheme. But see post at [141] (concluding that the only possible reason for rejecting such a measure is the drafters' ulterior, incumbent-protective motive).

So as not to restrict its proceedings upon remand in any way—and to avoid the strictures of the mandate rule, see, e.g., United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001) (explaining that the mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court") (citation, emphasis and internal quotation marks omitted)—we have elected to speak broadly in framing the inquiry to be undertaken on remand. To do as our dissenting colleague suggests, on the limited record before us, would unnecessarily and unwisely encroach on the essential role of the district judge in these proceedings.

tailored.[26]

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[26] Before leaving the issue of the constitutionality of the spending limits, we briefly address a concern raised by our dissenting colleague: that there is language in Act 64 relating to the expenditure limits that renders the provision impermissibly vague. See post at [29-45]. As a threshold matter, it must be pointed out that plaintiffs did not raise this claim either in the District Court or on appeal—and it is not because they were unfamiliar with such a claim. Indeed, plaintiffs made this kind of argument with regard to other provisions in Act 64 also at issue in this case, see infra at 87; and one plaintiff, represented by the same counsel as here, challenged other provisions of Act 64 in a previous case on these grounds. See Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000) ("VRLC identifies an additional constitutional problem posed by [the disclosure provisions]: They are impermissibly vague."). We will not strike down a state statute, in a pre-enforcement facial challenge, on grounds upon which it has not been challenged.

The dissent takes issue specifically with several aspects of the statutory language that pertain to the expenditure limits—that the spending is made "for the purpose of influencing an election," that it applies to "anything of value," and the spending is attributable to a "candidate." See post at [29-38]. Of these, the first two provisions have been a part of federal and state campaign finance laws for decades, and they have been upheld by the Supreme Court. See *Buckley*, 424 U.S. at 145-47; 2 U.S.C. § 431(8)(A)(i). As to the last provision regarding "spending attributable to a candidate," the notion that candidates do not know when they are candidates is belied by the specificity of the provision itself. As the dissent appears to acknowledge, Act 64 defines "candidate" as someone who has done one of three specific things. See post at [37]. Though the dissent raises the possibility that a candidate could be deemed a candidate by some other "affirmative action" not defined by statute, see *id.*, no plaintiff has raised this concern in light of the statute's clarity in this regard.

Finally, we note that, of course, as with all campaign finance regulations, minor ambiguities, omissions or statutory quirks will be resolved in the normal course of administrative interpretation, legislative amendment and litigation. In any event, the ambiguities raised by the dissent do not, we believe, render the statute unconstitutional. Indeed, though raising the specter of a multitude of pitfalls latent in the statutory text, even our dissenting colleague would uphold the constitutionality of the majority of the Act—despite that many of those same ambiguities speak to portions

With respect to treating related expenditures as candidate expenditures, *see* § 2809(b), the District Court did not analyze this question after deciding that candidate expenditure limits were unconstitutional *per se*. On remand, independent of the constitutionality of expenditure limits, the District Court should evaluate this issue.

Because a content-based regulation of speech such as this is presumptively invalid, and the District Court held it unconstitutional, we leave in place the injunction against enforcement of these provisions pending further proceedings consistent with this opinion.[27]

II. Act 64's Contribution Limitations

Act 64 also imposes four basic types of contribution limitations. First, contributions by individuals to candidates are limited to $200 for state representative and other local offices, $300 for state senator and other county offices, and $400 for statewide office. *See* Vt. Stat. Ann. tit. 17, § 2805(a). Second, PACs and political parties may not accept contributions from a single source in excess of $2000 and are subject to the individual contribution limits when contributing to candidates. *See id.* Third, individuals, PACs or political parties that make "related expenditures" with candidates must count those expenditures toward the relevant expenditure and contribution limits. *See id.* at § 2809(a)-(c). Finally, candidates, PACs, and political parties may not accept more than 25 percent of their total resources from out-of-state sources. *See id.* at § 2805(c).

A. Limitations on Contributions by Individuals to Candidates

The contribution limits of $200 (state

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of the Act unanimously upheld in Part II of this opinion.

[27] Any amendment by the Vermont legislature to mandatory spending caps in the interim has the potential, of course, to moot litigation over its constitutionality.

representative), $300 (state senator), and $400 (statewide office) are subject to a lesser degree of scrutiny than expenditure limits, as explained most recently by the Supreme Court in *Shrink*. 528 U.S. at 386. Contribution limits can survive "if the Government demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tuned." *Id.* at 387-88 (internal quotation marks omitted).

The governmental interest in eliminating actual and apparent corruption is sufficient to support Vermont's limits on contributions to candidates. The *Buckley* Court upheld limitations of $1000 on contributions to candidates for federal office on the strength of this interest alone. "It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification . . . ." 424 U.S. at *26; see also McConnell,* 540 U.S. at __, 124 S.Ct. at 647 (explaining that in *Buckley,* the Court "determined that limiting contributions served an interest in protecting 'the integrity of our system of representative democracy'") (quoting *Buckley,* 424 U.S. at 26-27); *Jacobus v. Alaska,* 338 F.3d 1095, 1107 (9th Cir. 2003) ("[A] failure to regulate the arena of campaign finance allows the influence of wealthy individuals and corporations to drown out the voices of individual citizens, producing a political system unresponsive to the needs and desires of the public, and causing the public to become disillusioned with and mistrustful of the political system."). In this case, the District Court relied on trial testimony, citizen polls, comments by public officials and media coverage to demonstrate the real and perceived threat of corruption in Vermont. 118 F. Supp. 2d at 469, 478. As the District Court concluded, "[t]he threat of corruption in Vermont is far from illusory." *Id.* at 478.

In addition, we conclude that the Vermont limits are "closely drawn" to this anti-corruption interest. The District Court's findings in this respect are reasonable and based on the evidence adduced at trial. *Id.* at 470, 478-80. The District Court relied in part on expert testimony indicating that over the last three election cycles, less than 10 percent of contributions exceeded the limits set by the Vermont legislature. *Id.* at 478. Based on testimony by both plaintiffs and defendants' witnesses, the District Court also concluded that the limitations approximated amounts "considered suspiciously large by the Vermont public." *Id.* at 479-80. And finally, the court compared the Vermont law to similar limits upheld in Maine and Missouri. In Maine, a limit of $250 for House and Senate candidates was upheld. *See Daggett v. Comm'n on Governmental Ethics & Election Practices,* 205 F.3d 445, 459 (1st Cir. 2000). In Missouri, limits of $1075, $525, and $275, depending on the size of the electoral district have been upheld. *See Shrink,* 528 U.S. at 396-98, *remanded to Shrink Mo. Gov't PAC v. Adams,* 204 F.3d 838, 840-42 (8th Cir. 2000).[28]

The contribution ceilings are also sufficiently high to permit effective campaigning. Overly restrictive contribution limits might "have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. Contribution limits, however, need not be perfectly set: the failure of the legislators to "engage in such fine tuning does not invalidate the legislation." *Id.* at 30. As we have indicated, "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* We agree

[28] The District Court noted that by way of comparison, the Vermont law has a limit-constituency ratio (i.e., the maximum contribution allowed divided by the number of constituents) of .00068, compared to .00040 under the Missouri statute. 118 F. Supp. 2d at 479.

with the District Court's conclusion that the contribution limits imposed by Act 64 do not "amount to differences in kind."

As the District Court found, the limits imposed by Vermont hardly overwhelm the ability of candidates to engage in active and effective campaigning. The District Court marshaled evidence to support its findings, and conducted a fact-intensive analysis of what constitutes effective campaigning. 118 F. Supp. 2d at 478-79. Moreover, Vermont has actually conducted an election since the imposition of these contribution limits (for Mayor of Burlington), and that election involved effective campaigns despite the contribution limitations. *Id.* at 471, 479. Subject to the applicable limits imposed by the statute, the mayoral candidates raised funds comparable to the amounts spent in State Senate races in the past. *Id.* The District Court further concluded that the limits may actually improve the ability of candidates to campaign, by freeing candidates from the time-consuming task of "wooing big donors." *Id.* at 480.

B. Limitations on Contributions to and by PACs and Political Parties

Act 64 also regulates the ability of PACs and political parties to give and receive contributions. The Act prohibits such organizations from accepting contributions of more than $2000 from a single source during any two-year general election cycle. *See* Vt. Stat. Ann. tit 17, § 2805(a). The Act further prohibits those organizations from making contributions to political candidates in excess of the general contribution limits—$200 for state representatives or local office, $300 for state senator or county office, and $400 for statewide office. *See id.* at §§ 2805(a)-(b).

The District Court upheld these limitations, except as applied to contributions by political parties to their own candidates. 118 F. Supp. 2d at 486-87. Upon review, we hold that all of these limitations are constitutional. We thus affirm

the judgment of the District Court as to the constitutionality of most of the limitations, but reject the District Court's conclusion that political parties cannot be prohibited from contributing to candidates in excess of generally applicable limitations. We discuss three narrow issues that require further attention and, as to two of those issues, further proceedings before the District Court.

We first consider the issue of the $2000 limitation on contributions to political committees or political action committees and political parties. Act 64 defines "political committees" or "political action committees" as "any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election or advocating a position on a public question, in any election or affecting the outcome of an election." Vt. Stat. Ann. tit 17, §2801(4). A political party is defined as including both the central party apparatus and "any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." *Id.* at § 2801(5).

Perhaps the most typical application of these rules would involve contributions to a political committee or political party that participates in the political process either by making contributions to or coordinated expenditures with candidates for office. As applied to these organizations, the $2000 limitation is unquestionably constitutional. Political action committees "derive rights from their members" and are accordingly due First Amendment protection. *Colorado Republican II,* 533 U.S. 431, 448 n.10. It is well established, however, that the state interest in fighting corruption, real and apparent, justifies limitations on contributions by individuals to particular candidate committees. Such a state interest is equally capable of justifying limits on

contributions made to political parties or committees.

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.

Cal. Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197 (1981) (*"CMA"*).

The plaintiffs do not dispute that, in principle, such limitations may be constitutional. Instead, they argue that Vermont's chosen limitations are overbroad, both because the statute applies to too many organizations and because it sets the contribution ceiling too low.

Regarding the first point, the plaintiffs assert that the restriction is an "overbroad, blunderbuss approach that punishes" even those organizations that are unlikely to corrupt the political process. They imply that certain types of PACs, "particularly legislative leadership PACs or ideological PACs," pose a weaker danger of corruption and should therefore be permitted greater latitude in determining how to allocate their contributions. The plaintiffs argue that the limits are unconstitutional because Vermont has not shown any independent evidence that political parties and PACs have a negative or deleterious effect on Vermont's politics. Further, the plaintiffs contend, these organizations are even less likely to corrupt in light of Act 64's other limitations on campaign financing. Private individuals cannot, for example, effectively funnel large gifts through political parties because parties can themselves only make contributions to candidates of between $200 and $400.

An argument identical to the plaintiffs' overbreadth

argument was addressed and rejected in *Buckley*. There, the appellants argued that many large contributors have no interest in corrupting the political process, and the law was overbroad for restricting the rights of these unthreatening contributors. The Supreme Court upheld the constitutional validity of generally applicable contribution limits of $1000, even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29. The Court reasoned that the very corruption rationale which provides a foundation for the constitutional validity of contribution limitations supports their general applicability: "Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

These arguments were also rejected by the Supreme Court in *CMA*. 453 U.S. at 197. In that case, a California political action committee challenged a $5000 federal limit on annual contributions by individuals and associations to multicandidate political committees. *See id.* at 186. Like the plaintiffs here, the parties in *CMA* asserted that such limitations do not serve the government's strong interest in preventing actual or apparent corruption in the political process. *See id* at 197. The Supreme Court concluded that *"Buckley* precludes any argument" that the government may not limit the size of contributions made to multicandidate committees, and rejected the assertion that such limitations do not further the government's interest in battling political corruption. *Id.* Without such limitations, individuals could evade the contribution limitation "by channeling funds through a multicandidate political committee." *Id.* at 198.

In light of these prior holdings, we are unpersuaded by the plaintiffs' contention that Vermont had an obligation to divine which PACs and political parties pose the most

serious risk of corruption, and develop a record that donations to each type of organization, narrowly defined, pose a strong threat of corruption. It is clear that, in principle, such limitations are an "appropriate means . . . to protect the integrity of the contribution restrictions upheld . . . in *Buckley*." *CMA*, 453 U.S. at 199. Thus, the Vermont provision is constitutional so long as the danger of corruption of the political system exists. Just as individuals may be limited from directly contributing to campaign organizations, individuals may be limited from doing so indirectly—that is, contributing large sums to PACs or political parties that funnel money to candidates. *See Buckley*, 424 U.S. at 38; *cf. Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003) (explaining that "restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits'") (citation omitted; alteration in original). Vermont does not have the burden to show on a contributor-by-contributor basis that contributions have led to corruption.

The plaintiffs' second argument is that the $200, $300, and $400 limits on contributions to candidates for office are unnecessarily low, and that political parties and PACs should be exempt. The plaintiffs in *Buckley* also raised this argument, contending that the $1000 limitation regulated more contributions than necessary to accomplish its anti-corruption goals. Specifically, the appellants argued that even contributions of a larger amount did not carry a risk of corruption because no politician would throw away a career and reputation for a $1000 donation. As with the earlier overbreadth argument, the Supreme Court also has rejected this contention. *See Buckley*, 424 U.S. at 30. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (quotations and citations omitted). The Court reaffirmed the validity of this approach in *Shrink*, stating that a contribution limit survives

scrutiny only if the regulation is "closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." 528 U.S. at 387-88 (citations and internal quotation marks omitted; alteration in original); *see also Montana Right to Life Assoc. v. Eddleman,* 343 F.3d 1085, 1095 (9th Cir. 2003) (same).

In order to succeed, then, plaintiffs must establish that when the limitations are applied to political parties and political action committees, they impose such a severe burden that it results in a "difference[] in kind" from alternative limits. *Buckley,* 424 U.S. at 30. In other words, a party seeking a special exemption from such laws carries a large burden. Illustrative of the political parties' and political action committees' burden in this regard is *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) *(MCFL).* In that case, the Supreme Court considered the constitutionality of a federal law which bans corporations from making any political expenditures from general corporate funds. The statute's purpose was to regulate "the corrosive influence of concentrated corporate wealth." *Id.* at 257. The Federal Election Commission had sought enforcement of the provision against an incorporated, non-profit pro-life advocacy organization that had "features more akin to voluntary political associations than business firms." *Id.* at 263. The Court held that, as applied, the provision was unconstitutional because the stated interest does not apply to an incorporated association like MCFL. *Id.* at 263-64. The Court set forth specific and demanding criteria for determining when other corporations fall into this constitutionally mandated exclusion, which the advocacy organization was able to meet. *Id.*

We should expect that the plaintiffs here bear a similar burden of establishing their exceptionalism, even if the particular facts of *MCFL* do not apply. Unlike the situation in *MCFL,* the PACs here have offered no evidence that PACs and political parties have overriding features

exempting them from the general findings about actual and apparent corruption in Vermont. Nor have they provided evidence that the limitations, when applied to these organizations, impose such a severe burden on speech as to constitute a difference in kind. As mentioned, the District Court concluded, after considering a large body of evidence, that the contribution limits are high enough so that they do not constitute a severe infringement—a difference in kind—of the ability to associate politically. 118 F. Supp. 2d at 476-81. We thus agree with the judgment of the District Court and find that Act 64's contributions limits on political action committees and parties are constitutional.

The District Court did find support for one exception to the candidate contribution limits: those made by political parties. In this regard, we reject the District Court's conclusion that on account of their "unique role in the mechanics of our democracy," political parties must have greater freedom to provide their candidates with financial support. *Id.* at 486. Relying on the central place of political parties in elections, the District Court held that the generally applicable limits were too severe when applied to parties. This was despite the fact that the District Court had already concluded that candidates can receive sufficient funds to effectively exercise their First Amendment rights even when restricted by Act 64's contribution limits. Nevertheless the District Court held that "[s]uch limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper." *Id.* at 487.

We see no other way to understand the District Court's position than as being founded on the belief that political parties operate as specially protected institutions under our Constitution and thus merit special treatment. Whatever the validity of this principle in other legal contexts, the Supreme Court has recently left no doubt that parties do not deserve a special exemption from generally applicable contribution limits. *See Colorado Republican II,*

533 U.S. at 480-82. In that case, the Colorado Republican Party challenged the constitutionality of restrictions on expenditures it made in coordination with candidates for office, arguing that "coordinated spending is essential to parties because a party and its candidate are joined at the hip, owing to the very conception of the party as an organization formed to elect candidates." *Id.* at 477 (citations and quotation marks omitted). The Court held that such limitations are a constitutional mechanism for ensuring that contributors do not circumvent the federal contribution limit and rejected the claim that political parties occupy some special place in our constitutional system. Above all, the argument fails because, just as with other political organizations, political parties "are necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors." *Id.* at 479. Thus, as it does with any other contributor to political campaigns, the government has an interest in restricting the flow of money from parties to candidates in order to reduce actual and apparent corruption. "The Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out." *Id.* at 481. Since we agree with the District Court's conclusion that Vermont's limits are "vital to deter avoidance of the individual contribution limits," 118 F. Supp. 2d at 487, we hold that their application to political parties is supported by this strong governmental interest.

Having concluded that the restriction of contributions from political parties is supported by a constitutionally sufficient governmental interest, we turn to the question of whether the statute is sufficiently tailored to this interest. As discussed above, the District Court reviewed the limits based

upon data reflecting the costs of elections and the views of citizens regarding what constitutes suspiciously large gifts. Based on this body of evidence, the District Court concluded that gifts in excess of the limits create the appearance of, and increase the likelihood of, corruption. Moreover, contributions in the amounts permitted by the Act provide citizens an adequate tool for "speaking their mind" by giving a donation in order to affiliate with a candidate. *Id.* at 478-80.

However, there are three narrower issues that require more individual attention. The first concerns the Act's definition of local and state party affiliates as a single entity. For the purposes of determining whether a political party has exceeded its various contribution limitations, Act 64 defines a political party as "any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, § 2801(5). Vermont's Secretary of State has interpreted this provision, in conjunction with Vt. Stat. Ann. tit. 17, §§ 2301-2320, to require that state and local branches of political parties be considered a single unit for the purposes of applying contribution limits, and determining whether those limits have been reached or violated.

Plaintiff Vermont Republican State Committee argues that this definition requires the party to treat itself as a single monolithic unit, and requires the party to abandon its current, decentralized structure. However, the plaintiff has not cited any actual changes that will need to be made, except that local and state affiliates will now have to record and coordinate their contributions. In other words, the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform. Moreover, the District Court indicated doubt as to whether the Republican Party actually demonstrated that it operates in the decentralized form that it

claims. For example, the state committee brought suit on behalf of all of the town and county committees without ever consulting them or asking them to approve the lawsuit. 118 F. Supp. 2d at 487-88. The District Court also noted that federal election law treats state, county, and town committees as a single unit for the purposes of campaign finance. *Id.* We agree with the District Court that, insofar as Vermont's campaign finance law treats state and local affiliates as a single entity, it suffers from no constitutional defect.

Second, the plaintiffs have argued that Act 64 applies to even those political action committees that make wholly independent expenditures. Plaintiff Vermont Right to Life Committee-Fund for Independent Political Expenditures ("VRLC-FIPE"), which is affiliated with the Vermont Right to Life Committee ("VRLC"), is a political committee that, by its charter, cannot make contributions to candidates. It has asserted that it makes only independent expenditures, that is, it never coordinates its expenditures with candidates for office. Thus it argues that when applied to itself, the $2000 cap operates as a limitation on independent expenditures.

The statute does appear to lend itself to such an interpretation. On the one hand, the Act explicitly states that it does not apply to independent expenditures. The law explicitly states that "[t]he limitations on contributions . . . shall not apply to contributions made for the purpose of advocating a position on a public question, including a constitutional amendment." Vt. Stat. Ann. tit. 17, § 2805(g). Nonetheless, it appears that VRLC may be correct that even political organizations that make solely independent expenditures, but nonetheless advocate the election of particular candidates, would be covered. *See id.* at § 2801(4).

Thus, we remand for findings on the following points: (1) whether plaintiff VRLC makes solely independent expenditures and thus has standing to challenge this

provision; (2) whether the Vermont law actually restricts independent expenditures by such organizations; and (3) whether Vermont has a sufficiently strong governmental interest in regulating PACs that do not coordinate their expenditures with candidates for office.

Finally, we remand for additional proceedings on the issue of how Act 64 implicates the ability of a state and local party affiliates to receive funds from national affiliates. Act 64 apparently limits the transfer of money from national to state and local parties, and that limit might impose a significant burden on political parties. Vt. Stat. Ann. Tit. 17, §§ 2801(5), 2805(a)-(b). How a party allocates money between its national, state and local affiliates constitutes an important component of party organization. It determines who in the party exercises decision-making authority, who speaks for the party, and how the party arranges its internal finances. At the same time, the failure to limit such transfers might create a loophole that would easily enable contributors to circumvent the $2000 limit on gifts to state parties. *See McConnell,* 540 U.S. at __, 124 S.Ct. at 671 (upholding federal legislation "sharply curbing" the ability of donors to circumvent contribution limits by channeling nonfederal or "soft" money through state political committees to finance "Federal election activity"). The District Court never made specific findings of fact regarding this issue, including how national and local affiliates of the political parties interact and how limitations on transfers of money might affect parties. Since we are reluctant to rule on this issue without the benefit of findings of fact on how such a provision might be expected to operate, we remand for further proceedings.

C. The Related Expenditure Provision is Constitutional as to Contributions

We also affirm the District Court's holding that the "related expenditure" provisions of Act 64 are constitutional because they serve to reinforce the anti-corruption goals of

the contribution limitations. Pursuant to Act 64, "related expenditures" on behalf of a candidate by a third party count toward the third party's contribution limit as well as the candidate's expenditure limit. The Act defines related expenditures as those "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The plaintiffs challenge the provision on three grounds: (1) the phrase "facilitated by" is vague; (2) political parties and PACs should have greater abilities to engage in coordinated expenditures with candidates; and (3) the Act's rebuttable presumption that an expenditure benefitting six or fewer candidates is a related expenditure is a content-based speech restriction discouraging advertisements about a small number of candidates. We reject each claim.

Plaintiffs argue that the "facilitated by" standard is vague because it leaves open the possibility that *any* communication about a candidate's views with a third party that then undertakes independent expenditures will qualify as a contribution. The First Amendment permits the treatment of "coordinated expenditures" as contributions to a candidate. *Buckley,* 424 U.S. at 46-47. Independent expenditures may not be limited because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo." *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 498 (1985). The plaintiffs' objection to Act 64 is really one which assumes that the word "facilitated" has its broadest meaning, akin to giving any aid in support of the third-party expenditure. If that were what the statute meant, then we would agree that the provision might raise constitutional problems.

We think that, in light of the terms "solicited by or approved by" that accompany it, the term facilitated should be given a narrower reading. Such a reading would also

resolve the ambiguity of the statutory language so as to guarantee the constitutionality of the statute. *See* William Eskridge, *Legislation: Statutes and the Creation of Public Policy,* 873-89 (3d Ed. 2001) (discussing canon of constitutional avoidance). Accordingly, we construe the phrase "facilitated by" as requiring some "prearrangement" or "coordination" with the candidate. *Nat'l Conservative Political Action Comm.,* 470 U.S. at 498. Under such a construction, sharing routine information about a candidate is not sufficient to meet the "facilitated by" requirement. Thus, the provision is not constitutionally inval*id.*

Nor is there any constitutional barrier to applying this provision to related expenditures by PACs and political parties. The plaintiffs' argument on this point substantially restates their claim discussed above—that different contribution limits ought to apply to PACs and political parties. We reject it for the same reasons.

Finally, the provision's rebuttable presumption, which presumes that expenditures by political parties or PACs that benefit six or fewer candidates are contributions to those candidates, does not violate the Constitution by chilling protected speech. The plaintiffs argue that the presumption is unconstitutional because (1) the law may never presume that an expenditure is coordinated and (2) the presumption could never be rebutted and, as a result, chills independent advocacy of particular candidates. We find neither claim persuasive.

The Constitution does not bar the use of rebuttable presumptions in this context. The plaintiffs base their argument on *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604 (1996) *(Colorado Republican I).* There, the Supreme Court struck down a federal provision that automatically treated all party expenditures, including those made independently, as contributions to candidates. The Court rejected the Court of

Appeals' analysis that the government was entitled to a conclusive presumption that party expenditures are coordinated. *Id.* at 619. The fact that the presumption was conclusive, however, played the critical role in that decision: it eliminated the need for a finding that the expenditures were in fact coordinated and foreclosed the possibility of a defense. *Id.* at 625. Act 64 does nothing of the sort, since its presumption is rebuttable.

The plaintiffs' argument that the presumption is functionally conclusive because one "cannot prove a negative" is, at least in the legal arena, inaccurate. There are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent from the candidate it supported. The party can, for example, testify that no discussion took place with the candidate about advertising strategies, including the sharing of information about advertising plans. Candidates can testify that they never gave feedback on an independent advertising scheme or that the third parties never solicited such feedback. Adjudicative bodies can take such evidence, or other similar testimony, as proof and infer a lack of coordination. For these reasons, we uphold Act 64's rebuttable presumption concerning related expenditures.

D. The 25 Percent Limit on Out-of-State Donations is Unconstitutional

We can find no sufficiently important governmental interest to support the provision of Act 64 that limits out-of-state contributions to 25 percent of all candidate contributions. Unlike all of the other Act 64 provisions at issue in this appeal, the out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents). The District Court's decision in this regard should be upheld.

The District Court concluded that Vermont's interest

in eliminating excessive out-of-state contributions was confined to unusually large contributions. 118 F. Supp. 2d at 484. The District Court also noted that many non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections. *Id.* We find no support in the record for the alternative claim that Vermont has an important interest in singling out one class of contributors for limitations. *See* 1997 Vt. Laws P.A. 64 (H.28) (1997) (finding No. 5) ("Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors."). There are only vague references to the danger of out-of-state contributions, and all refer to the danger of excessively large (not cumulatively great) contributions.

In the two reported decisions on the issue, courts have split on whether limitations of non-resident contributions may be upheld on corruption grounds. The Ninth Circuit has rejected, almost in bright-line form, limitations on non-resident restrictions. In *VanNatta v. Keisling,* the court struck down an Oregon initiative that effectively limited the use of non-resident contributions to 10 percent of total campaign expenditures. *See VanNatta,* 151 F.3d 1215, 12 17-18 (9th Cir. 1998), *cert. denied sub nom., Miller v. VanNatta,* 525 U.S. 1104 (1999); *but see Montana Right to Life Assoc. v. Eddleman,* 343 F.3d 1085, 1091 n.2 (9th Cir. 2003) (suggesting that *VanNatta* was superseded by *Shrink).* Addressing the asserted anti-corruption justification, the court held that the provision suffered from both over- and underbreadth. Its overbreadth stemmed from the fact that it prevented all non-resident contributions once the 10 percent threshold had been reached, even those too small to have any corruptive influence. *See VanNatta,* 151 F.3d at 1221. The provision was underbroad because it did nothing to prevent corruptive *(i.e.,* large) resident contributions; nor did it prevent corruptive non-resident contributions until the 10

percent limit had been reached. *See id.* In other words, the non-resident cap was "not closely drawn to advance the goal of preventing corruption." *Id.*

Because Act 64 contains contribution limits, it does not share all of the flaws of the Oregon statute considered in *VanNatta.* Act 64 does, for example, limit large resident and non-resident contributions. Nonetheless, the provision is overbroad in that it prohibits small contributions from out-of-state sources once the 25 percent threshold has been reached, even though such contributions are no more likely to corrupt than in-state contributions. Under this analysis, sustaining the provision would require an additional explanation for why exactly Vermont has an interest in eliminating such small donations only from non-residents.

The Alaska Supreme Court has attempted to craft such an explanation in *State v. Alaska Civil Liberties Union,* 978 P.2d 597 (Alaska 1999), *cert. denied,* 528 U.S. 1153 (2000). The Alaska law at issue capped out-of-state contributions but at lower percentages than Vermont's law. The court upheld the limitations on the grounds that out-of-state contributions have the ability to distort the Alaskan political system: "These nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by the elections, Alaska residents. These restraints therefore limit the 'potential for distortion.'" *Id.* at 617. Put another way, Alaska's "[m]ore than 100 years of experience . . . have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies." *Id.* The out-of-state limitation, according to this view, restrains their distorting influence. *Id.*

The analysis in the Alaska case is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley and Shrink.* Even under the more expansive *Shrink* analysis, the fear was that candidates would become too compliant with the wishes of large contributors because they must rely on private interest groups for funding. The *Alaska* analysis permits limitations not to ensure candidate independence generally, but to limit the influence of one set of people—untrustworthy outsiders. Even assuming that the Alaska Supreme Court is correct that outsiders have bad motives and little to contribute to its political discourse, the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say.

The Alaska Court's concern could be understood another way: that when candidates are beholden to fundraisers, and not voters, then large contributions from non-residents distort the system. Again, this problem would endure even if officials were beholden to in-state contributors. Moreover, Vermont's expenditure limitations eliminate the major force behind candidates' excessive reliance on campaign contributors—their need to maximize their ability to raise funds by remaining pliant to the wishes of those who contribute to the political campaign system.

Based on our review of these cases and the governmental interests asserted by the defendants, we are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents. Vermont has asserted no valid interest sufficiently strong to justify the provision, and we therefore hold it unconstitutional. Pursuant to Act 64's severability provision, the unconstitutional provisions should be severed.

CONCLUSION

In summary, we conclude that Vermont has a sufficiently important governmental interest in support of Act 64's contribution limits—fighting the real and apparent corruption that accompanies unlimited campaign gifts—and that those contribution limits are closely drawn to achieve this goal. Accordingly, except as noted below, we uphold Act 64's contribution limits. Vermont also has established two interests in favor of Act 64's expenditure limitations that, taken together, are constitutionally compelling: namely, protecting the time of candidates and elected officials, and preventing the reality and appearance of corruption. Although we find that these limits permit candidates for public office to engage in effective campaigns, additional fact-finding is required to complete this narrow tailoring inquiry. On remand, the District Court must determine whether the legislature might have chosen either another type of regulation or higher limits that would still achieve the goals we sanction and yet impinge less on the First Amendment rights at stake.

For the reasons set forth, we affirm the District Court's holdings that the following provisions of Act 64 are constitutional: (1) the limit on contributions that candidates may accept from individuals or political action committees (§ 2805); (2) the limit on contributions that political action committees and political parties may accept from any source (§ 2805(a)); (3) the definition of political parties as including state, county and town entities (§ 2801(5); and (4) the classification of related expenditures as contributions (§ 2809(a)). We also affirm the District Court's finding that the limits on contributions from non-Vermont residents and organizations (§ 2805(c)) are unconstitutional and we uphold its injunction against enforcement of that provision.

We vacate the District Court's injunction against enforcement of the limitation on contributions by political

parties to candidates (§ 2805(a)). We also vacate the judgment and remand for further proceedings with respect to the constitutionality of (1) limiting candidate expenditures (§2805a); (2) treating the "related expenditures" of third parties as candidate expenditures (§ 2809(b)); (3) restricting the ability of PACs to make wholly independent expenditures, to the extent the Act's provisions are read to impose such restrictions (§§ 2801(4), 2805(g)); and (4) limiting transfers of funds from national to state political party affiliates (§§ 2801(5), 2805(a)-(b)). Finally, we affirm the District Court's injunction against enforcement of Act 64's expenditure limitations, pending further proceedings.[29]

In vacating aspects of the District Court's injunction, we are mindful that Act 64's limitations are premised on a two-year election cycle. Given that further proceedings must be held, we remand to the District Court the issue of when the various limitations revived by this opinion should be given effect. We thus authorize the District Court to designate an appropriate effective date for these limitations that causes the least disruption to the current election cycle.

Each party shall bear its own costs on this appeal.

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[29] Because our original opinion was withdrawn, the petition for rehearing as to that opinion became moot. Upon the filing of this substituted opinion, however, the parties may, if they so desire, file petitions for rehearing as though this were our original decision.

Landell v. Vermont Public Research, No. 00- 9159

WINTER, Circuit Judge, dissenting,

I concur in part in the result reached by my colleagues' opinion. I respectfully dissent from their holdings as to Act 64's limits on expenditures by candidates, including "related expenditures" by individual supporters and political parties, and as to the Act's forced centralization of local political parties. In view of the length of this separate opinion, I begin with a table of contents.

[On advice from the Office of the Clerk for the United States Supreme Court the table of contents has been omitted, as the reformatting of this appendix has rendered the pagination inaccurate.]

I. INTRODUCTION

On August 7, 2002, my colleagues filed an extensive majority opinion in this matter. I filed a partial dissent that was almost as long as the majority opinion. Although our opinions, subsequently vacated by my colleagues, were a clear and present danger to the forests of the nation, they failed to join issue in many ways.

My colleagues' opinion in the main adopted the stated purposes of the Vermont legislature and the opinions of its proponents as sufficient constitutional justifications for Act 64. My dissent was largely a detailed statutory analysis of Act 64, concluding that it limits or prohibits a vast range of ordinary political activities. The dissent also discussed the Act's pervasive ambiguities to be resolved through the often *ad hoc* discretionary decisions by those who must administer it and was critical of my colleagues for viewing the Act through the prism of what its proponents said about it instead of what the Act itself says.

Although my dissent has been substantially revised to address issues raised by my colleagues' decision to remand rather than reverse with regard to the expenditure limits issue, to elaborate in more detail the evidence that Act 64 is intended to protect incumbent legislators, and to provide a more particularized discussion of the evidence in the record, not much has changed since my colleagues vacated our earlier opinions. Their revised opinion does not discuss or even mention, to take only a few examples, the following concrete effects of Act 64:

> (i) Act 64's limits on expenditures are so low that they are below the amount spent in the past by third-party candidates, *see infra* Part IV (b)(1)(C);

(ii) Act 64 limits a candidate who must run in both a primary and general election to the same expenditures as an opponent who runs only in the general election, *see infra* Parts III(b), IV(c);

(iii) a favorable press editorial after an interview with a candidate must be valued and treated as a contribution to, and expenditure by, the candidate's campaign subject to Act 64's limits, *see infra* Parts III(g), IV(d);

(iv) according to Vermont's Secretary of State, if a candidate provides a photo or written materials to a person who uses the photo or materials in a publication, the candidate must treat the cost of the publication as an expenditure by the candidate, *see infra* Parts III(g), IV(d); *Appendix A*;

(v) the draconian limits on the activities of autonomous local units of political parties resulting from Act 64's requirement that funding for all local activities, such as a town committee picnic, must be from a single statewide party bank account with the permission of the person who controls that account, *see infra* note 1, Part IV(a)(2), (e);

(vi) the need for campaign volunteers to keep records of every mile they drive to meetings, to campaign events, or on other campaign business over a two-year period, *see infra* Parts III(e), IV(a)(1);

(vii) the need of a campaign to treat the miles driven by volunteers as a campaign expenditure subject to Act 64's limits (and to keep records and report that mileage), and to prohibit further driving by volunteers whenever limited (by Act 64) campaign resources are needed for other activities or the expenditure limits have been reached, *see infra* Parts III(e), IV(a)(1); or

(viii) the restrictions on ordinary homeowners wanting to hold meet the candidates events (and again the need for a candidate's campaign to record and limit such events as campaign expenditures), *see infra* Part IV(a)(1).

My colleagues now remand Act 64's expenditure limits principally for an inquiry into whether the Vermont legislature considered somewhat higher limits as a less restrictive alternative. Even putting aside the Supreme Court's holding that expenditure limits are *per se* unconstitutional, *see Buckley v. Valeo*, 424 U.S. 1, 45, 54, 57 (1976) (*per curiam*), that language used in Act 64 is unconstitutionally vague, 424 U.S. at 44, 80, *see infra* note 6, and the fact that, even under the standard applied by my colleagues, the levels of Act 64's limits are unconstitutionally low and clearly protective of incumbents, the remand is something of an oddity. First, it involves largely legal issues described by my colleagues as factual. Second, the issue should be whether less restrictive alternatives exist, not whether the Vermont legislature considered them. Third, the degree of an alternative's restrictiveness cannot be evaluated without knowing what is restrictive, and to what degree, about the law in question. However, the only discussion of Act 64's specific restrictions on political activity is found in this dissent.

Fourth, a speech-supportive and constitutionally sound alternative -- a combination of private and public financing with low contribution limits -- is obviously available. In fact, Act 64 itself limits contributions to such small amounts -- $400 for statewide candidates, $300 for Senate candidates, and $200 for House candidates -- that there is no evidence showing that the possibility of improper influence on officeholders is at present anything but negligible.

I therefore respectfully continue to dissent as to the constitutionality of two aspects of Act 64. *See* 1997 Vermont Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883) ("Act 64"). Those aspects are Act 64's limits on expenditures by candidates, including related expenditures by individual supporters and political parties, and its restrictions on fundraising and spending on party-building activities by state, county, and local committees of a political party. *Id.* §§ 2801(5), 2805a. Otherwise, based on Supreme Court precedent, I concur in the result reached by my colleagues.

II. APPLICABLE CONSTITUTIONAL PRINCIPLES

a) Overview

Neither Act 64's limits on expenditures nor its restrictions on independent fundraising and expenditures by state or local party committees involve new issues of constitutional law.

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*), held, without qualification, that government may not limit campaign expenditures by candidates for electoral office. *Id.* at 45, 54, 57. Act 64 limits such expenditures notwithstanding *Buckley*. Indeed, the proponents of Act 64 never doubted its unconstitutionality under *Buckley* and

enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*. *See infra* note 2 and accompanying text. Act 64's limits on expenditures violate the First Amendment because they limit a broad spectrum of political speech and activity, including ordinary grassroots activities and editorializing and reporting by the press, for no permissible purpose. Further, they entrust those who enforce the law with unfettered, and unconstitutional, discretion to determine, often on an *ad hoc* basis, what acts of political advocacy are permitted and what are prohibited. Even if expenditure limits were not *per se* unconstitutional, the low level at which the limits are set by Act 64 so heavily favors incumbents that it can be upheld only by application of a legal test similarly skewed toward incumbents. *See infra* Part V(d).

Moreover, Act 64 treats a contribution to a local political party affiliate as a contribution to all affiliates and requires that all such contributions be initially deposited in the state party bank account. *See infra* note 1. This means that all funding for a local affiliate's activities -- even for a six-pack of diet soda for a town committee picnic -- must be approved and paid by the person who controls that statewide account. At a stroke, and without any proffered reason, much less a statement of a compelling governmental interest, this revolutionary provision destroys the autonomy of local affiliates of political parties from each other and from the state party organization , and thereby violates both freedom of speech and freedom of association.

Act 64 suppresses ordinary political activity at every level of the electoral process. It reflects the philosophy of one witness for the defense who testified that government ought to regulate political speech the way it regulates public utilities. Trial Tr. vol. V at 167 (Helen David-Friedman). Act 64 may be a popular law -- although this dissent will note several instances of great disquiet and even shock among

proponents upon learning what it actually says -- but only because its proponents systematically divert attention from the law's actual provisions to the nobility of their goal -- here the transfer of political power from "special interests" to "ordinary citizens." Maj. Op. at 40, Appellant's Br. at 24-29; Trial Tr. vol. IX at 57-62 (Gordon Bristol); *id.* at 137 (Elizabeth Ready); Trial Tr. vol. VII at 88 (Cheryl Rivers); Trial Tr. vol. VIII at 63-64 (Peter Smith). However, even this attractive rhetoric cloaks sinister purposes. Foiling "special interests" while empowering "ordinary citizens" is a rhetorical staple of electoral politicians of every viewpoint because the terms are used as synonyms for one's opponents and supporters respectively. In this light, the pursuit of this goal through the regulation of political speech is the road to the suppression of opponents.

As Justice Brandeis once noted, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). And Justice Black has reminded us that "[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952) (Black, J., dissenting). Act 64, which has its greatest impact in silencing those ordinary citizens whose active participation in politics takes place through organized groups, provides us with a modern reminder of the wisdom of those two statements.

b) Money and Protected Political Speech

The activities limited by Act 64 are the ordinary stuff of democracy that constitutes the core of the conduct protected by the First Amendment. There is "practically universal agreement that a major purpose of [the First] Amendment was to protect" political speech. *Mills v. Alabama*, 384 U.S. 214, 218 (1966), *quoted in McIntyre v.*

Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

As *Buckley* held, because money is needed for access to resources of communication, any limit on the use of money for political speech is a limit on that speech. 424 U.S. at 19. Political speech without an audience is not worth the effort. Political speakers must therefore go to where voters are or speak through a medium that voters watch or hear. Without resources of communication, no speech is effective. Without money, resources are not obtainable. Cars use gas. Gas costs money. A candidate who has reached Act 64's limits on expenditures and may not even drive the family car to a town green to make a speech is as effectively barred from speaking as he or she would be if the law flatly prohibited the speech itself. As the Supreme Court has stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.

Buckley, 424 U.S. at 19.

Proponents of Act 64 rarely acknowledge this fact in stressing their preference for limiting political speech to the "old-fashioned handshake campaign," Trial Tr. vol. IX at 47 (Gordon Bristol), including "meet and greet" events, Trial Tr. vol. X at 187 (Karen Kitzmiller), such as "spaghetti suppers, "Trial Tr. vol. IX at 221 (Anthony Pollina), "little parties" for "150 people" to which "a couple hundred" people are invited by mail, *id.* at 141-42 (Elizabeth Ready), Rotary Club and Jaycees meetings, Trial Tr. vol. V at 43 (Donald Hooper), booths at county fairs, Trial Tr. vol. IX at 129 (Elizabeth Ready), barbecues, op-ed articles published in the press, *id.* at 135 (Elizabeth Ready), women's groups meetings, "various boards" meetings, Trial Tr. vol. VII at 17 (Toby Young), and so forth. However, all such activities consume resources for which someone makes, or has made, expenditures of money, *e.g.*, use of a vehicle, gas, food, soft drinks, meeting rooms, postage, salaries for editors and deliverymen, a printing facility, and so forth. Act 64's proponents do not recognize these hard facts, but the Act does, and its limits on campaign expenditures directly affect -- either by limiting or requiring a largely discretionary exemption for -- each of the items described above.

c) Freedom to Organize Political Parties

The First Amendment requires that citizens be allowed freely to form political organizations at various levels of government . This protection extends to allowing organizations to be related to each other as affiliates of the same political party while still retaining much local autonomy. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (stating that "political parties' government, structure, and activities enjoy constitutional protection" and noting that a political party has "'discretion in how to organize itself, conduct its affairs, and select its leaders,'") (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989)); *see also Buckley*,

424 U.S. at 15 (recognizing the right "'to associate with the political party of one's choice'" and noting that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association'") (internal citations omitted). Act 64 treats state, county, and local affiliates of a political party as a single aggregated unit for purposes of fundraising and contribution limits, *see* Vt. Stat. Ann. tit. 17, § 2801(5), and requires that all contributions to a political party so defined be initially deposited in a single, statewide checking account.[1] As a result, local affiliates can raise and spend

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[1] Act 64 contains the following pertinent provisions. It states, by way of definition:

"Political party" means a political party organized under chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party.

Vt. Stat. Ann. tit. 17, § 2801(5). In particular, it is this definition that governs the application of both the limits on contributions to, and expenditures by, "political parties," *e.g.* any contribution to an affiliate of a party is a contribution to all affiliates and the state party.

The Act further provides:

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by check from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account.

Vt. Stat. Vt. Stat. Ann. tit. 17, § 2802.

Each political committee and each political party which has accepted contributions or made expenditures of $500.00 or more shall register with the secretary of state stating its full name and address, the name of

money only through access to, and with the permission of, whoever controls that bank account.

d) Sufficient Governmental Interests

The Supreme Court has held that only the prevention of "corruption or the appearance of corruption" constitutes a sufficiently compelling interest to limit contributions to candidates. *See Buckley*, 424 U.S. at 25-28 (holding that limiting the actuality and appearance of corruption is a "constitutionally sufficient justification" for a contribution limitation, but dismissing other proffered justifications for the limitation). It has also held, however, that neither the anti-corruption rationale, the interest in equalizing the financial resources of candidates, nor the increase in money spent on political campaigns justifies the limiting of amounts that candidates for office may spend to promote their candidacy. *Id.* at 45, 54, 57. Indeed, the Court has stated that

> [t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who

its treasurer, and the name of the bank in which it maintains its campaign checking account within ten days of reaching the $500.00 threshold.

Vt. Stat. Ann. tit. 17, § 2831(a).

I do not read these provisions to prevent local affiliates from having separate bank accounts. I do read them, however, to require that all contributions to parties go initially to the single checking account mentioned in Section 2831 for purposes of reporting and enforcing the limits on contributions to parties. Withdrawal from that checking account must be only with the consent of those authorized to sign checks.

> must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley, 424 U.S. at 57.

Since *Buckley*, the Court has adhered to the distinction between the regulation of contributions and the regulation of expenditures. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 440-41 (2001) ("*Colorado II*"). In *Colorado II*, the Court made the statement, reaffirmed even more recently in *McConnell v. Federal Election Comm'n*, 540 U.S.___, 124 S. Ct. 619, 655 (2003), that "ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions," because "[r]estraints on expenditures generally curb more expressive and associational activity," and "limits on contributions are more clearly justified by a link to political corruption." *Id.* The Court went on to state that "*[g]iven these differences, we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups,* while repeatedly upholding contribution limits." *Id.* at 441-42 (citations and footnotes omitted) (emphasis in original).

One would think that the unqualified statements of the Supreme Court regarding the unconstitutionality of expenditure limits might be the end of the matter at this level of the court system, particularly since the sponsors of Act 64 have made no secret of their intention to enact it in order to provoke a test case to overrule *Buckley* with regard to expenditure limits. *See Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law* (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001GAMemoCF.html ("*2001 Memorandum*"); *see also*

Hearing on H. 28 Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Anthony Pollina); *Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations*, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., *Report on Campaign Finance*, H. 28, 64th Biennial Sess. (1997).[2] However, the views of my colleagues require that I describe in some detail why Act 64 is unconstitutional in the particular respects noted above, even under the constitutional test that they create.

e) Requisite Precision of Regulation

There is another body of First Amendment jurisprudence that is of relevance here: Any regulation of protected speech must embody valid criteria sufficiently precise to ensure that officials apply those criteria. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (stating that the Supreme Court has "required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review"); *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) ("'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'")

[2] The desire to challenge Buckley, even at the cost of living under a bad law, is exemplified by an astonishing statement of Vermont's Secretary of State. In transmitting to the Vermont legislature a review of the operation of Act 64, she cautioned against any amendment or repeal that would render the present litigation moot, even if the legislature thought the amendment or repeal in the public interest, because such an action would "frustrat[e] the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in Buckley v. Valeo." See 2001 Memorandum, supra.

(quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Otherwise, the officials who administer the law will have the discretion to fashion and apply their own criteria without restraint. *See Thomas*, 534 U.S. at 323 ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."); *Forsyth*, 505 U.S. at 131 ("If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.") (internal citations omitted).

Far from precise, much of Act 64 is more a theory than a body of legal rules. What it actually means in practice has been, in a literal multitude of critical respects, simply left to future executive or judicial rulings. Act 64 bristles with interpretive issues -- the meaning of "anything of value," "candidate," "for the purpose of influencing an election," "primarily benefits six or fewer candidates," "single source," "affirmative action to become a candidate," "services by individuals volunteering their time," and so on -- and with valuation questions -- of mileage, use of a room, office, computer, phone, professional services, etc. -- and leaves resolution of all of these issues to those who must administer and enforce the statute. *See* Vt. Stat. Ann. tit. 17, § 2801; *2001 Guide*, *supra*; *see also* discussion *infra* Part III (h).

f) Appropriate Level of Scrutiny

It is standard First Amendment jurisprudence that governmental restraints on protected speech must be subjected to exacting scrutiny to survive a constitutional challenge. *See Buckley*, 424 U.S. at 16, 44-45 (referring to the "exacting scrutiny required by the First Amendment," and applying exacting scrutiny to "limitations on core First

Amendment rights of political expression"); *Smith v. California*, 361 U.S. 147, 151 (1959) (applying "stricter standards" to a statute that has "a potentially inhibiting effect on speech," and noting that "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser") (citing *Winters v. New York*, 333 U.S. 507, 509-10, 517-18 (1948)); *see also McIntyre*, 514 U.S. at 347 (applying exacting scrutiny to invalidate an Ohio law that prohibited the distribution of anonymous campaign literature); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (holding that a statute prohibiting use of paid petition circulators burdens core political speech and is therefore subject to exacting scrutiny); *Lerman v. Bd. of Elections*, 232 F.3d 135, 146 (2d Cir. 2000) (applying "exacting scrutiny" to restriction of "core political speech" in overturning local residency requirement for petition witnesses).

The most exacting scrutiny must be given to legislation that expressly seeks to reallocate political power -- in the view of Act 64's proponents, from "special interests" to "ordinary citizens" -- by limiting the political activity of candidates for office and their supporters. *See Buckley*, 424 U.S. at 14-15 (calling political campaigns the "fullest and most urgent application" of the First Amendment guarantee, and invoking the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'") (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

As Justices Brandeis and Black have reminded us, the high-mindedness of a law's proponents is no guarantee that it does not flagrantly violate principles of freedom of expression. This is particularly true with regard to legislation that was, as I detail in Part VI(d) of this dissent, examined in the legislative process more for the nobility of its stated purposes than for what it actually says. Since Act 64's passage, surprise at its actual provisions and actual effects

has been expressed by many of the law's proponents.[3] Notably, one vigorous supporter who has been described as its author, Anthony Pollina, *see Vermont Reformer Says Law*

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[3] Surprise at the actual provisions of campaign finance laws is as old as the laws themselves. A veteran civil-liberties lawyer tells the following story. "In the summer of 1972, three old-time dissenters came into the offices of the New York Civil Liberties Union in Manhattan and told an extraordinary story. In May of that year they and a few like-minded others had drafted and sponsored a two-page advertisement that appeared in The New York Times. The advertisement was sharply critical of Richard M. Nixon, the President of the United States. The ad claimed that President Nixon had authorized the secret bombing of Cambodia, in violation of international law, and should be impeached and removed from office. The ad set forth the text of an impeachment resolution that had been introduced in the House of Representatives and contained an "Honor Roll" listing eight House members who had co-sponsored that resolution. The advertisement cost approximately $17,850, and the ad hoc group called itself the National Committee for Impeachment. Before the ink on the ad was barely dry, the group was sued by the United States Justice Department for running the advertisement.

When Randolph Phillips, one of the sponsors of the ad, told this story to the lawyers at the New York Civil Liberties Union, we were incredulous.

How could a group of citizens be sued by the Federal Government for publishing a criticism of the President of the United States? After all, this was 1972, and First Amendment law seemed at its most vigorous in the protections of public speech, one of the shining legacies of the Warren Court. What possible justification could the government have for suing this small group of protestors? We soon discovered the answer: campaign finance reform." Joel M. Gora, *No Law . . . Abridging*, 24 Harv. J.L. & Pub. Pol'y 841, 842-43 (2001) (reviewing Bradley A. Smith, *Unfree Speech* (2001)) (footnote omitted). The law in question was the Federal Election Campaign Act of 1971, which defined a political committee as any group that spent more than $1,000 annually "for the purpose of influencing" -- language used in Act 64 -- a federal election and imposed various requirements on a committee's purchase of advertisements relating to a federal candidate. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972).

He Authored is Unconstitutional, Political Finance, The Newsletter, March, 2002, has since sought to run for office and brought a lawsuit claiming that Act 64 violates the First Amendment. *See* Ross Sneyd, *Progressives Sue to Ensure Public Financing for Pollina*, Associated Press, Mar. 12, 2002.

Moreover, high-mindedness is, for some, a mode of self-deception obscuring self-serving motives or, for others, a facade useful in disadvantaging political opponents, routinely referred to as "special interests." When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents. My colleagues caution that the self-interest of incumbents should not cause us to presume that such legislation is unconstitutional. However, most of the major factual premises underlying Act 64 posit incumbents who value reelection over their duties to constituents and personal honor. These premises should not hold center stage when examining the ostensible justifications for Act 64 only to disappear when scrutinizing what its actual effects will be.

I also note that some of Act 64's proponents relied upon and quoted by my colleagues have themselves demonstrated the importance of self-interest among its supporters. For example, one (then) incumbent state senator testified that Act 64 was needed to stop the "arms race" in which some of her opponents buy "ads" and "yard signs" that catch voters' attention and cause voters to wonder whether she is running for reelection. Trial Tr. vol. IX at 148 (Elizabeth Ready). Another, as noted, brought a constitutional challenge to Act 64 when it impeded his political career.

Moreover, our experience in a similar area suggests that great caution is in order where incumbent legislators

pass laws affecting their electoral fate. Legislatures can directly affect the outcome of elections through two kinds of legislation: reapportionment and campaign finance regulation. Our experience with reapportionment is that, over time, the self-interest of incumbents has become the sole guiding star. *See infra* Part IV(c).

Indeed, whenever Congress takes up legislation involving campaign finance, the press now openly discusses how various proposals will affect the prospects of particular political parties and candidates. *See, e.g.*, Ruth Marcus & Dan Balz, *Democrats Have Fresh Doubts on "Soft Money" Ban; Some Fear GOP Would Gain Edge in Campaign Finances*, Washington Post, Mar. 5, 2001, at A1; John Mintz, *McCain's "Soft Money" Pledge Alarms GOP; Republican Leaders Say Curbs Would Hurt Party's Election Chances, Give Fund-Raising Edge to Democrats, Labor Unions*, Washington Post, Feb. 22, 2000, at A6. The assumption that these possible effects never enter the minds of the candidates for reelection who enact such legislation might be questioned by even the least cynical observer. Truly searching scrutiny of campaign finance legislation is therefore essential.

I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny. Their opinion describes the provisions of Act 64 in only cursory fashion. In a show of deference exceeding even that accorded decisions of an administrative body, it accepts the theory and factual assumptions proffered by the law's supporters at face value even when their actions belie their words. *See infra* Part VI(d) (failure to comply with reporting requirements); *infra* Parts IV(b)(1)(C), IV(c) (spending more than Act 64's limits); *supra* Part II(f) (bringing a lawsuit to challenge the constitutionality of the Act); *infra* V(e) (same). And it ignores the holding of *Buckley* that expenditure limits are *per se* unconstitutional.

Even without the direct precedent of *Buckley*, First Amendment jurisprudence does not allow laws that burden and prohibit political advocacy to be justified by the proffer of a theory based on spoken and unspoken factual assumptions without the most exacting judicial scrutiny of that theory, those factual assumptions, and the actual provisions of the law as enacted. Such scrutiny requires an examination of the details of the law passed, the degree of burden it imposes on protected speech, and the interests asserted as its justification. Accordingly, I turn to what *Buckley* directs as the first step of constitutional analysis, the details of the law challenged. 424 U.S. at 12.

III. THE PROVISIONS OF ACT 64

a) Overview

Beginning with an overview, Act 64 limits the amount of resources -- money and things of value -- that may be used by candidates in campaigns and that may be provided by individual supporters or political parties.[4] *See* Vt. Stat. Ann. tit. 17, §§ 2805, 2805a. It therefore contains limits on direct expenditures of money or use of things of value by candidates for electoral purposes and on direct contributions of money or things of value to campaigns. *See id.* Such limits would not necessarily reach activities that consume resources purchased and used by individuals and political parties to support a candidate's campaign. However, Act 64 styles these activities "related expenditures" and treats them both as candidate expenditures and as

[4] Because other provisions of Act 64 strike at the heart of the democratic political system, I will note only in a footnote one egregiously overreaching provision. Act 64 requires that all political advertisements identify who paid for them, with an address, and which candidate is benefitted. The Secretary of State has sought an exemption from this requirement for buttons and lapel stickers. *See 2001 Memorandum*, *supra*. So far, she has been unsuccessful.

contributions to a candidate subject to the statutory limits on those expenditures and contributions. *See id.* §§ 2809 (a), (b). Act 64 also requires that, for purposes of applying the limits, contributions to, and campaign expenditures by, state, county, and local affiliates of political parties are determined by aggregating, that is, by treating all affiliates as a single unit. *See id.* §§ 2801(5), 2805(a), 2809(d). To that end, Act 64 requires that all money raised by state, county, and local affiliates be put in a single bank account. *See supra* note 1, and accompanying text.

Act 64 provides a public financing option for candidates for Governor and Lieutenant Governor. *See id.* §§ 2851-2856. Eligibility for public financing turns in part on Act 64's definitions of "contributions" and "expenditures," and, therefore, of "related expenditures." Were a candidate to raise or expend more than $500 before February 15 of the election year -- or have supporters, including a political party, make related expenditures in excess of that amount -- the candidate would not be eligible for public financing. *See id.* § 2853 (a).

An effort like Act 64 of course must provide some definition of the conduct regulated and the substance of what is prohibited and what is permitted. Where limits on campaign expenditures and contributions are imposed by dollar value, a time frame must be selected. The statutory scheme must also include an enforcement scheme, a delicate matter when electoral speech by candidates and their supporters is regulated by governmental officials -- often their opponents -- and a multitude of statutory ambiguities and problems of interpretation and valuation abound. Scrutiny of the details of such regulation is necessary to inform the constitutional inquiry regarding the degree of impact on protected speech and conduct, the requisite nexus between the regulation and constitutionally permissible goals, and the accuracy, reliability, and likely adherence to

those goals of the designated enforcement mechanisms.

b) Two-Year Cycle

As noted, establishing a basic legal framework for regulating political campaigns first requires selection of a time frame(s) for the provision of public financing and for totaling candidate expenditures, contributions, and related expenditures by individuals and political parties in order to enforce limits on their size. Act 64 is schizophrenic in that regard. For purposes of public financing, it establishes separate time periods and separate funding for primary and general elections in recognition of the obvious fact that some candidates must fund both a primary and general election campaign while others need fund only a general election. *See id.* § 2 855 (a).

For purposes of limiting contributions and expenditures, however, Act 64 imposes a so-called "two-year cycle" approach. *See id.* §§ 2805(a), 2805a(a); *see also 2001 Guide*, *supra*. Under that approach, expenditures by candidates, contributions, and related expenditures by individuals and political parties supporting candidates are totaled over a two-year period for purposes of enforcing the statutory limitations. The effect of the two-year cycle is not inconsequential. Vermont, like most American states, provides both for primaries and for subsequent general elections. *See* Vt. Stat. Ann. tit. 17, §§ 2103(15),(25), 2351. Because the two-year cycle lumps these elections together, contribution and expenditure limits, including related expenditures by individuals and political parties, are imposed on the total raised and spent by individual candidates in both electoral periods. In other words, Act 64 limits a candidate who must wage a serious primary fight to the same amount of total financing as his or her general election opponent who did not face a primary contest.

The two-year cycle introduces another complexity -- and creates much room for anti-democratic manipulation -- because party primaries in Vermont are not restricted to voters registered in the particular party but are open to all voters, including those registered in other parties. *See id.* § 2363; *see also* Ian Urbina, *Leveling Politics in the Green Mountain State*, The American Prospect, Sept. 25, 2000, at 41 (discussing Vermont's cross-over voting in primaries); *Vermont's Senate Race, The Common Man*, The Economist, Sept. 5, 1998, at 25. The amount that a candidate must spend in a primary, therefore, may be substantially affected by voters who are seeking to disadvantage the candidate in the general election.

c) Limits on Expenditures by Candidates

Act 64 defines candidate "expenditures" to include "payments, distributions, and disbursements of money or anything of value for the purpose of influencing an election." Vt. Stat. Ann. tit. 17, § 2801(3).[5] The breadth of this language is indisputable. Given its ordinary meaning, the language includes the value of the use of phones, computers, offices, rooms in residences or elsewhere, paper, pencils, autos, etc. *See 2001 Guide*, *supra*; *1999 Memorandum*, *supra*. For example, according to Vermont's Secretary of State, a candidate's use of an auto is an expenditure. *See 2001 Memorandum*, *supra*. Candidates therefore may not drive their personal vehicles for campaign purposes without

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[5] The pertinent provision reads:

> "Expenditure" means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

Vt. Stat. Ann. tit. 17, § 2801(3).

recording every mile driven and treating the costs of that driving as a campaign expenditure. *See id.* Vermont's Secretary of State has suggested that 31¢ per mile is an accurate measure of expense for this purpose. *See id.* (She has not changed this figure notwithstanding the facts that the price of gasoline has risen and official Vermont travel is now compensated at 37½¢ per mile. *See* id; Vermont Dept. of Personnel, *Collective Bargaining Agreements*, at http://www.Vermontpersonnel.org/employee/labor_cba.cfm (effective July 1, 2003 to June 30, 2005) (setting mileage reimbursement for Vermont employees at level established by the U.S. General Services Administration, currently 37¢).) These expenditure limits also apply to candidates who exclusively use personal funds to fund their campaigns. *See* Vt. Stat. Ann. tit. 17, § 2805a(a).

Two terms are critical to determining what activities are "expenditures" subject to the limits: "for the purpose of influencing an election," *see id.* § 2801(3), and "candidate," *see id.* § 2801(1). Notwithstanding the assertion of a footnote in my colleagues' opinion,[6] the breadth of the phrase "for the

[6] My colleagues assert that the phrase expenditures "for the purpose of influencing an election" was "upheld" against a claim of unconstitutional vagueness by the Supreme Court in *Buckley*. Maj. Op. at 76 n.26. In fact, what the Court said was virtually the opposite.

The relevant passage in *Buckley* addressed a limit "for the purpose of influencing an election" on expenditures by persons who were neither candidates nor political committees. The "for the purpose of . . ." language was modified by the phrase "relative to a clearly identified candidate." *Buckley* stated that the definition of expenditures was unconstitutionally vague *unless* the adjectival phrase was construed narrowly to apply only to "communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44 (expenditure limits apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'", id. at n.52; limits struck down on other grounds). As to reporting requirements imposed on persons who were neither candidates nor political committees regarding expenditures and contributions not made to candidates or political committees, the Court also held those to be impermissibly vague unless the phrase "for the purpose of influencing an election" was construed "in the same way" as the aforementioned terms, i.e., to apply only to expenditures and contributions expressly advocating the election or defeat of a clearly identified candidate. Id. at 80.

Act 64 does not contain the language "relative to a clearly identified candidate," and relevant Vermont authorities have not construed Act 64 in this limited manner, see *2001 Guide*, *supra*. As a result, the holding in *Buckley* invalidates Act 64's expenditure limits for vagueness.

purpose of influencing an election" is such as to be in substantial part hopelessly ambiguous and was said by the Supreme Court in *Buckley*[7] to be unconstitutionally vague.

[7] The Supreme Court's recent decision in McConnell did not alter the Buckley analysis. McConnell upheld the phrase "electioneering communication" -- where those funding such communications faced restrictions and disclosure requirements -- against a challenge of unconstitutional vagueness. The term is defined as "'any broadcast, cable, or satellite communication'" that "'refers to a clearly identified candidate for Federal office,'" is made during certain time periods, and "'in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.'" McConnell, 124 S.Ct. at 686-87 (quoting 2 U.S.C. § 434(f)(3)(A)(i)). A communication is "'targeted to the relevant electorate'" if it "'can be received by 50,000 or more persons' in the district or State the candidate seeks to represent." Id. In upholding the term "electioneering communication," the Court explained that it held "for the purpose of . . . influencing" a federal election unconstitutionally vague in Buckley not because issue advocacy (as opposed to express advocacy) can never be limited, but rather because the limitations on advocacy imposed by that phrase were unconstitutionally vague. Id. at 688. "Electioneering communication," in contrast, could be regulated because it describes only a well-defined subset of issue advocacy. Id. ("In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."). Another provision upheld in McConnell against a vagueness challenge was similarly specifically defined. Id. at 675 n.64; 2 U.S.C. § 431(20)(A)(iii) (limits on contributions to fund a "public communication that refers to a clearly identified candidate for Federal office (regardless

424 U.S. at 44, 80; *see supra* note 6. At one end of an interpretive spectrum, that phrase would probably not include a candidate's cost of driving to a town hall to register to vote and, later, of driving to vote, although even that driving fits within Act 64's literal definition of expenditure. At the other end of the spectrum, candidate Jones's purchase of an ad stating "Vote for Jones Next Tuesday" would certainly be an expenditure. Between those extremes are a multitude of activities that may influence an upcoming election but lack an accompanying statement of express purpose. As to these, the statute offers no guidance.

Potentially the most significant area of ambiguity involves activities of incumbent officials. Members of the executive and legislative branches engage in relatively continuous communication with the public that involves the use of resources in a way that will help a reelection effort and would therefore fit within the definition of "expenditure," if done by a "candidate" "for the purpose of influencing an election." For example, Vermont's Secretary of State has a publicly funded website that does not avoid capitalizing on the political opportunity offered. *See Vermont Secretary of State Website*, at http://www.sec.state.vt.us/. The home page features a photo of her with a backdrop of mountains and pine trees. Other pages of the site also find it necessary to include a photo of the incumbent. Such a website not only offers favorable exposure but also involves the preparation of materials easily put to political use as

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of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)," 2 U.S.C. § 431(20)(A)(iii), not unconstitutionally vague because "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision," McConnell, 124 S.Ct. at 675).

flyers and ads.[8] The Vermont Democratic Party website

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[8] For example, the central link on the Secretary of State website is entitled "Visit the Secretary's Desk," a section that includes a picture of the incumbent on each page. *Vermont Secretary of State's Website*, at http://www.sec.state.vt.us/secdesk/index.html. This section also houses her "Biography," which includes the following passage:

> As Secretary of State, Markowitz has enhanced the office's services to Vermont's businesses, banks and professionals. She has made customer service a priority and created a state of the art web site to serve the business community. Markowitz has also protected consumers of professional services by reducing the backlog of professional licensing complaints and by starting a public information campaign to inform consumers of their rights to competent professional services. Markowitz has also promoted civics education in Vermont's schools and has encouraged Vermonters to be active participants in democracy by volunteering in town government and by voting.

Id. at http://www.sec.state.vt.us/secdesk/marko.html.

> The Vermont Attorney General's Office has a similar website. The first page houses a photograph of the incumbent, whose biography page reads as follows:
>
> Welcome to the Home Page for Vermont Attorney General William H. Sorrell. The Attorney General is the chief law enforcement officer in the state. He is charged with representing the state in all matters in which the state is a party or has an interest. The office of the Attorney General is dedicated to the protection of the health and safety of all Vermonters
>
> A native and resident of Burlington, Vermont, Attorney General William H. Sorrell graduated from the University of Notre Dame (AB, magna cum laude, 1970) and Cornell Law School (JD, 1974). Bill served as Chittenden County Deputy State's Attorney from 1975-1977; Chittenden County State's Attorney, 1977-78 and 1989-1992; engaged in private law practice at McNeil, Murray & Sorrell, 1978-1989; and served as Vermont's Secretary of Administration, 1992-1997. As State's Attorney, he personally successfully prosecuted several significant matters,

underlines the political usefulness of the official Secretary of State website by offering visitors to the party's website a link to the official site. *See Vermont Democratic Party Website*, at http://www.vtdemocrats.org. *See also Burlington GOP Website*, at http://www.burlingtongop.com (linking to republican Jim Douglas' official Vermont Governor Web site).

The statute offers no guidance on the many questions of how the relevant language is to be applied in practice to incumbents' activities, even though the answers may have a decisive impact on particular candidates. If most of the resource-consuming activities of officeholders are not

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including the first case allowing the admissibility of DNA evidence in a Vermont State Court and a ten-year-old homicide in which the victim's body had never been found.

Governor Howard Dean appointed General Sorrell to fill the unexpired term of now Vermont Chief Justice Jeffrey Amestoy, commencing May 1, 1997. He has enjoyed strong voter support in standing for election in November 1998, 2000 and 2002. His current term of office will expire in January 2005.

Bill is on the board of the American Legacy Foundation; has served on the Judicial Nominating Board; as president of United Cerebral Palsy of Vermont; secretary of the Vermont Coalition of the Handicapped; and on the board of the Winooski Valley Park District Bill has recently been elected the President-Elect of the National Association of Attorneys General (NAAG) and will assume the Presidency of that organization for a one-year term beginning in June of 2004. He is chair of the NAAG Tobacco Committee and co-chair of its Consumer Protection Committee. In June of 2003, Bill was selected by his peers from around the country to receive NAAG's Kelley-Wyman Award, given annually to the "Outstanding Attorney General" who has done the most to further the goals of the nation's attorneys general.

Office of the Vermont Attorney General, at http://www.atg.state.vt.us/display.php?smod=70.

"expenditures" because they occur in the course of the officeholders' public duties, incumbents will have an enormous advantage over challengers under expenditure limits. If most of these activities are "expenditures," an incumbent officeholder might well use the bulk of permitted expenditures in the first year of the two-year cycle. There are also hundreds of intermediary positions, all of which are arbitrary to one degree or another.

Some interpretive guidance, but not much, may be gleaned from the definition of "candidate." A "candidate" is someone who "has taken affirmative action to become a candidate."[9] Contrary to the assertion in a footnote in my colleagues' opinion,[10] the elastic phrase "affirmative action"

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[9] The pertinent provision reads:

> "Candidate" means an individual who has taken affirmative action to become a candidate for state, county, local or legislative office in a primary, special, general or local election. An affirmative action shall include one or more of the following:
>
> (A) accepting contributions or making expenditures totalling $500.00 or more; or
>
> (B) filing the requisite petition for nomination under this title or being nominated by primary or caucus; or
>
> (C) announcing that he seeks an elected position as a state, county or local officer or a position as representative or senator in the general assembly.

Vt. Stat. Ann. tit. 17, § 2801(1).

[10] My colleagues assert that the word "candidate" is not vague because candidates know when they are candidates, and because "the notion that candidates do not know when they are candidates is belied by the specificity of the provision itself." Maj. Op. at 76 n.26. The issue, however, is not one of notice but one of enforcement. The question is not whether a candidate knows when he or she is a candidate, but what acts, or in the words of Act 64, "affirmative action[s]," will be deemed by Vermont authorities to trigger expenditure limits for purposes of the

and the self-evident circularity of using a word in its own definition leave ample room for disputes over the definition's meaning. Persons who fully intend to run for office, but have not announced, engage in all sorts of conduct to bring themselves into the public eye, to appear interested and informed on public issues, and to commend themselves as potential candidates to the media and political leaders. They attend meetings of school boards, selectmen, and various public forums. *See* Trial Tr. vol. IX at 135 (Elizabeth Ready). Even these efforts require the use of money or things of value, are intended to influence the outcome of an election, and therefore meet the definition of expenditure if done by a "candidate." That issue thus turns on whether such conduct constitutes an "affirmative action."

A degree of clarity is added by the next sentence of the definition, which states that affirmative action shall include three kinds of acts. However, most of the basic ambiguity is left in place because the use of language of inclusion does not suggest that what follows is an exclusive list of "affirmative act[s]." The first set of included acts involves accepting "contributions" or making "expenditures" in excess of a total of $500. *See id.* § 2801(1)(A). This brings into the definition of candidate all of the ambiguities of the term "expenditure" -- and "related expenditure" -- including the pre-campaign conduct noted above that is fully intended to influence the outcome of an election. In addition, as the Secretary of State has noted, an individual not fully decided upon, but considering, a run for statewide office will trigger the definition of candidacy by driving four round trips between Swanton and Brattleboro at (the now obsolete) 31¢ per mile. *See 2001 Memorandum*, *supra*. A person's official candidacy can also be triggered by acts of the person's

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statute. Resolution of this question on a case-by-case basis ultimately rests within the discretion of some body external to the statute, whether it be the courts or the Secretary of State.

political party deemed to be "related expenditures" valued in excess of $500. *See* Vt. Stat. Ann. tit. 17, §§ 2809, 2853(a); *see also* Ross Sneyd, *Progressives' Poll Raises Question About Public Financing*, Associated Press, Feb. 21, 2002. The two other acts included are filing a petition for nomination or announcing a candidacy. *See* Vt. Stat. Ann. tit. 17, §§ 2801(1)(B), (1)(C). However, these provisions clarify things that were not ambiguous.

> The limits on expenditures by candidates over the two-year cycle vary with the office sought, as follows:
>
> Governor - $300,000
>
> Lieutenant governor - $100,000
>
> Other statewide offices - $45,000
>
> State senator - $4,000 plus $2,500 for each additional seat in the district
>
> County office - $4,000
>
> State representative, single member district - $2,000, two member district - $3,000.

See id. § 2805a(a).

Incumbents may spend 85% -- except for legislators, who may spend 90% -- of the expenditure limits. *See id.* § 2805a(c).

d) Limits on Contributions to Candidates

"Contributions" are similarly broadly defined as any "payment, distribution, advance, deposit, loan or gift of money or anything of value paid or promised to be paid to a person for the purpose of influencing an election . . . ." *Id.* § 2801(2).[11] The limits apply to "single source" donors, defined as "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." *See id.* §§ 2801(6), 2805(a). Exempted from the definition of contribution are "services provided without compensation by individuals volunteering their time on behalf of a candidate." Id. § 2 801 (2).

Ambiguities lurk in the words "paid to a candidate" with regard to a resource used in a campaign by the resource's owner, for example, a campaign worker's use of a personal vehicle. Some of these ambiguities are cured in part by the definition of "related expenditures," discussed below.

Uncured are the ambiguities in the term "services provided without compensation" by volunteers. These uncertainties are particularly great -- and very important -- with regard to professional services, particularly legal

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[11] The pertinent provision reads:

> "Contribution" means a payment, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid to a person for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates in any election, but shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate, political committee or political party. For purposes of this chapter, "contribution" shall not include a personal loan from a lending institution.

Vt. Stat. Ann. tit. 17, § 2801(2).

services, which are of great value to a candidate who runs for office under Act 64. A few of the many questions that will arise are: If an employee or partner engages in political activity during working hours and the firm does not dock the appropriate amount of compensation, is that a contribution by the firm? Can professionals who are not solo practitioners provide free professional services to candidates? If a professional is not generally free under a firm's employment arrangements to moonlight professional services to others, is the provision of such services to a candidate in non-working hours a contribution by the firm to the candidate valued according to the firm's usual billing rate? And so on.

The definition of "single source" also contains ambiguities. For example, rendering a non-obvious interpretation, the Secretary of State has stated that partnerships may make contributions as separate entities from the partners themselves, who are free to make identical contributions as individuals. See *2001 Guide*, *supra*. Questions also arise about corporations with only one shareholder, *e.g.*, are professional corporations operated by solo practitioners firms separate from their owners for purposes of the contribution limits?

As noted, the contribution limits also apply to money, goods, or services provided to political parties, and the various affiliates of a party are treated as one unit for the purpose of these limits. That is, a contribution to a Democratic town committee is limited as noted immediately *infra*, *see* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805(a), and is viewed as a contribution to all Democratic town, county, and state committees. Further, that contribution must be paid into a single statewide bank account, *see supra* note 1 and accompanying text. This provision therefore necessitates statewide reporting and control of spending by affiliates, which can receive funds only from the statewide bank account.

The limits on contributions also vary by office sought and political committee as follows:

Political party/political committee - $2,000

Statewide office - $400

State senate/county office - $300

State representative/local office - $200.

See id. § 2805(a).

e) Limits on "Related Expenditures"

Turning now to "related expenditures," they are defined as "expenditures" (including, therefore, things of value and importing the ambiguities described above) "intentionally facilitated by, solicited by or approved by the candidate." *Id.* § 2809(c).[12] They include "expenditures" by individual supporters of candidates and by the political parties that sponsor the candidates. "Related expenditures" therefore include the value of mileage driven by campaign volunteers, the use by a volunteer of a residence, house phone, or computer, or other expenditures by volunteers for

[12] The pertinent provision reads:

> For the purposes of this section, a "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee.

Vt. Stat. Ann. tit. 17, § 2809(c).

items such as paper, pens, etc. They also include the cost of polling, the printed information on candidates, and offices and phones, etc., provided by political parties.

The law regulates "related expenditures" in two ways. First, it treats them as contributions subject to the limits on contributions described above. Every use of an in-kind resource -- car, phone, computer, etc. -- must thus be valued and totaled with direct cash contributions on an ongoing basis. *See id.* § 2809(a). Use of the in-kind resource must cease when the contribution limit is reached.

Second, Act 64 also treats related expenditures as candidate expenditures. When an individual's or party's related expenditures exceed $50, the candidate on whose behalf they were made must treat them as campaign expenditures limited by the statute. *See id.* § 2809(b).[13] This means that, over a two-year period, every supporter of a candidate who drives the family car to campaign meetings or provides paper, pens, phones, refreshments, or rooms for meetings, must keep a running total and, when the total exceeds $50 -- driving an average of seven miles per month at 31¢ per mile triggers this -- the candidate must fit the amount under the statutory limit on candidate expenditures.

As noted, related expenditures include activities of political parties, such as polls, mailings, dinners, and other

[13] Section 2809(b) reads in full:

> A related campaign expenditure made on a candidate's behalf shall be considered an expenditure by the candidate on whose behalf it was made. However, if the expenditure did not exceed $50.00, the expenditure shall not be considered an expenditure by the candidate on whose behalf it was made.

Vt. Stat. Ann. tit. 17, § 2809(b).

events.[14] If such party activities fall within the definition, they must be treated as contributions to, and expenditures by, the candidate. Such activities can, therefore, trigger an official candidacy, destroy eligibility for public financing, or exhaust the total that a candidate may spend in the two-year

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[14] Section 2809(d) reads in full:

> An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates. An expenditure made by a political party or by a political committee that recruits or endorses candidates, that substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure made on a candidate's behalf. In addition, an expenditure shall not be considered a "related campaign expenditure made on the candidate's behalf" if all of the following apply:
>
> (1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally.
>
> (2) The expenditures were made only for refreshments and related supplies that were consumed at that event.
>
> (3) The amount of the expenditures for the event was less than $100.00.

Vt. Stat. Ann. tit. 17, § 2809(d).

cycle. *See 2001 Guide*, *supra*; *see also* Vt. Stat. Ann. tit. 17, §§ 2805a, 2853. It will be recalled that the district court struck down the provisions of Act 64 subjecting related expenditures by parties to the Act's contribution limits, *e.g.*, no more than $400 in cash or related expenditures to a candidate for statewide office. Given the holding of *Colorado II*, 533 U.S. at 465, these provisions are now revived.

To illustrate the effect of these provisions, I have added as *Appendix A* a letter from the Secretary of State responding to an inquiry as to whether certain party activities should be deemed related expenditures attributable to a particular candidate. The letter makes it clear that parties and their candidates can avoid the risk of an unexpected attribution of a large sum to a campaign only by eschewing normal and necessary political activities. For example, according to the Secretary of State, there is danger in sharing party-funded poll results with candidates or potential candidates; candidates or potential candidates must avoid any knowledge of party mailings; candidates must avoid participation in planning or even approving a party event (a party event at which a candidate is introduced apparently must be a surprise party); and parties must avoid mailings that have a "primary thrust" of supporting candidates. *See Appendix A*, *infra*. The Secretary and Attorney General wisely advise, "Each party and potential candidate should review proposed activities with their own counsel," *id.*, although this will be difficult for the candidate where he or she must remain ignorant of the event.

f) Costs of Compliance

The costs of complying with the law's various provisions are not exempted from the limits on expenditures. *See 2001 Guide*, *supra*. Raising contributions itself costs money and is an expenditure. *See id.* Indeed, the limits on

the size of contributions increase these fundraising costs. Moreover, for a candidate to comply with the expenditure limits, he or she must, over a two-year period, either restrict the activities of supporters and the party organization, including the driving of personal vehicles, that constitute related expenditures, or keep in constant contact with supporters and the organization to monitor the size of such expenditures. A failure either to restrict or to monitor related expenditures will create the very real risk that, at a critical stage of the campaign, several supporters or party officials will report that they have exceeded the $50 limit and have, therefore, made expenditures that must be counted as candidate expenditures and may exhaust the campaign limit. In a statewide campaign, the monitoring and limiting of related expenditures by individuals or party organizations might well require a full-time staff member.

Moreover, a candidate who does not have legal counsel and other professional services runs great risks. The ambiguities detailed above and problems of valuation will confront candidates and supporters -- or at least those who seek to comply with the law as written -- with an ongoing need for professional advice. In fact, the Secretary of State and Attorney General advise that parties and candidates retain their own separate attorneys. *See Appendix A*. As noted, the cost of these attorneys, or the value of their services if obtained as unpaid-for related expenditures by individuals or a political party, are expenditures. *See* Vt. Stat. Ann. tit. 17, § 2801(3); *infra* Part V (e).

g) Treatment of the Press

Although this legislation was fostered by groups experienced in these matters, it does not contain the usual exemption for editorials, op-ed pieces, or even letters to the editor that endorse a particular candidate. *See, e.g.*, N.Y. Elec. Law § 14-124 (exempting "any person, association or

corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business"); Conn. Gen. Stat. § 9-333w(c) (exempting "any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility and for which it does not charge or receive any compensation whatsoever").

Vermont's Secretary of State (the one with the photo-heavy website) has warned that if any individual or organization "requests a photograph, written presentation, or other assistance or information and informs the candidate that the requested information will be used in a publication . . . [providing such] will trigger a related expenditure." *2001 Guide*, *supra*. Therefore when: (i) a Vermont candidate meets with an editorial board, commentator, or columnist hoping for an endorsement; (ii) a supporter of the candidate uses campaign materials to author an op-ed article for a paper; (iii) a campaign official sends a letter to the editor; or (iv) a campaign official conveys information to a reporter hoping for a news story; the value of any such publication is, under Act 64, a contribution and a related expenditure. *See* Vt. Stat. Ann. tit. 17, § 2809(c). *See also infra* Part IV(d).

h) Administration and Enforcement

I turn now to the processes governing administration and enforcement of this law. Power is delegated to the Secretary of State to "adopt rules necessary to administer the provisions" regarding related expenditures. Vt. Stat. Ann. tit. 17, § 2809(f). Additionally, the Secretary of State has a general administrative role under Act 64, *see, e.g., id.* §§ 2803, 2810a, and she has actively offered her interpretations of the scope and application of the various provisions of Act 64, *see, e.g., 2001 Guide*, *supra*; *1999 Memorandum*, *supra*; *2001 Memorandum*, *supra*. As the discussion above

indicates, interpretive and valuation questions abound and, as *Appendix A* indicates, answers that are not prolix or ambiguous are often not available. Moreover, there is at present every indication that the power to "adopt rules necessary to administer" the statute will be viewed by the Secretary of State as a very broad delegation of power. *See infra* Part V(e). For example, interpreting a provision requiring that all contributions in excess of $50 be made by check, the Secretary has said that Act 64 allows so-called "pass-the-hat " fundraisers at which persons may anonymously contribute up to $50 in cash. *See 2001 Guide, supra*. Because the givers are anonymous, a candidate is not expected to monitor how many times an individual may have put $50 into ever-moving "hats" at several "pass-the-hat" fundraisers. This ruling thus promotes fundraising practices that do not really control the size of cash contributions, unless, of course, an anonymous donor foolishly drops a $100 bill into a hat.

Finally, candidates who want to seek a determination that an expenditure is a related expenditure made on behalf of their opponents may bring an expedited action in the Vermont Superior Court. *See* Vt. Stat. Ann. tit. 17, § 2809(e). Candidates wanting clarification of their own expenditures, or persons wishing to make expenditures on behalf of candidates, may request advisory opinions from the Secretary of State. *See 2001 Guide, supra*. The costs of bringing or defending such actions, or making such inquiries, are not exempted from the definition of expenditure.

IV. THE BURDEN ON PROTECTED SPEECH

a) The Burden on Grassroots Political Activity

I begin with Act 64's burdening of grassroots political activities, not only because such activities are core-

protected speech under the First Amendment -- not to say indispensable to our democracy -- but also because proponents of Act 64 purport to justify its ubiquitously restrictive provisions in the name of increasing and enhancing such activities. *See* 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 6 and 8); Trial Tr. vol. IX at 124, 131 (Elizabeth Ready). In fact, Act 64 relentlessly limits such activities and often renders them impossible. Indeed, the Act's most intrusive impact is not on the rich and powerful, who if necessary can engage in constitutionally protected independent political activity, but on the ordinary citizen, who needs to participate in organized activity to have a political voice.

As the Supreme Court noted in *Buckley*, even the humblest kind of political activity requires the expenditure of resources. *Buckley*, 424 U.S. at 19. If the law as drafted is upheld, the quality and quantity of grassroots activities will be severely diminished, although one may question whether a free people will even attempt serious compliance with a law that, were the constitutional stakes not so great, might easily be regarded as an act of legislative silliness. *See infra* Part VI(d) (failure of Act 64 supporters to comply with its reporting requirements); *infra* note 32 (reporting mileage expenses in round numbers, despite per mile valuation of 31¢); *supra* note 4 (lapel buttons and bumper stickers must identify who paid for them, the payor's address, and the candidate benefitted).

1) Burden on Volunteer Activity

As noted, Act 64 treats all related expenditures as contributions and, when they exceed $50, as expenditures by the candidate whose candidacy was supported. *See* Vt. Stat. Ann. tit . 17, § 2809(b). Related expenditures must therefore be counted in determining whether the candidate has complied with Act 64 's spending limits. Because in-kind

expenditures are included within related expenditures, any supporter engaging in the most common kind of political activities must keep detailed records over a two-year period of their value -- every mile driven, every stamp used, every use of a residence for campaign events, refreshments, pads, pencils, use of phones, etc. -- so that the total amount of such in-kind expenditures can be determined. If a supporter's related expenditures, alone or when added to monetary contributions to a candidate, reach the contribution limit, the supporter must stop all activities -- even driving to a campaign event -- or violate the law.

For example, if a supporter holds a "meet the candidate" event in his or her house, the value of the space used, possibly the costs of refreshments,[15] and the purchase of stamps and envelopes for mailing invitations to local citizens are all related expenditures. *See 1999 Memorandum, supra*. Vermont's Secretary of State has stated that it usually takes one hundred invitations to attract twenty persons to a "meet the candidate " event. *See id.* Thirty-seven dollars would thus be used for postage alone for one event for twenty people. *See United States Postal Service, First-Class Mail Rate Highlights, available at* http://www.usps.com/ratecase/first.htm. As the Secretary of State of Vermont has noted, such "meet the candidate"

[15] There is an exemption for certain expenses relating to "meet the candidate" events in Section 2809(d). *See supra* notes 12, 14. Because Section 2809(d) relates generally to activities of political parties and committees and the exemption for meet the candidate events begins with the words "In addition," the exemption may well have been intended to apply only to party- or committee-sponsored events. The Secretary of State has indicated that the Attorney General believes it to apply to all such events, however sponsored. *See 1999 Memorandum, supra*. The Secretary of State's position is unclear. In any event, the Secretary of State has opined that, even with the exemption, Act 64 unduly discourages such events because their costs involve non-exempted expenses. *See id.*

events are therefore severely limited by Act 64. *See 1999 Memorandum, supra*.

Adding to Act 64's intrusiveness on grassroots activities is its treatment of such related expenditures as expenditures by the candidate. Driving to meetings is among the most garden variety of grassroots political activities. But, under the law, a supporter who averages seven miles per month over the two-year cycle will have exceeded $50 in mileage expenses, and the candidate in question must treat that and all other resource-consuming activities by the individual as campaign expenditures.

One effect is to prevent a candidate's supporters from exercising free choice as to what activities to undertake. Because the candidate's total expenditures are limited, the activities of all supporters must be coordinated and *controlled top-down* by the candidate for two full years so that the candidate can budget a campaign and not have to end it prematurely because of belatedly discovered related expenditures in excess of $50 that exhaust the expenditure limits. Were that to happen, a candidate, or any supporter over the $50 limit, would not even be able to drive the family car to the local town green to make a speech.[16]

[16] Another common form of grassroots activity is the contribution of time and expert services by local professionals to candidates. Here, as is so often the case, Act 64 is ambiguous, but the provision of such services may well be deemed a contribution and related expenditure of some considerable size, particularly if the professional is in a firm that normally restricts the moonlighting of professional services. Indeed, to exempt professionals would be precisely counter to the purpose of reducing the influence of special interests -- *e.g.*, clients of lawyers or the lawyers themselves -- and the well-to-do.

Act 64 therefore creates great incentives for campaigns to reduce the level of grassroots activities. The danger of unexpectedly reaching the expenditure limits will require a campaign to monitor, at a cost of time and resources, those grassroots activities it allows. Fewer such activities will be allowed because of these monitoring costs and because expenditure limits require that priority be given to activities that reach the largest number of voters, such as media advertising.

2) Burden on Local Party-Funded Activity

Many grassroots political activities are sponsored and subsidized by local political party affiliates. *See* Trial Tr . vol. IX at 138-39 (Elizabeth Ready) (party helps with "grass roots organizing," "voter I.D.," and "get-out-the-vote"). Act 64 diminishes almost to the point of elimination financial support for local party activity by treating all state, county, and local party committees as a single fundraising unit for purposes of raising, and therefore spending, money. Because all contributions must go to the state party account, all expenditures by every local committee must necessarily be funded out of it. Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *see supra* note 1. The effect is, first, to reduce severely the amount of funding for such activity -- under the limits on party related expenditures and contributions -- and, second, to force political parties into some form of top-down control -- under the single unit/single-bank-account rule for contributions to parties. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (reporting that both Republican and Democratic party leaders were shocked by the single unit rule); *supra* note 1. A town committee of a party may not even hold an organizational event with refreshments for its members without obtaining the modest funding needed from the statewide authority.

Moreover, limits on contributions and expenditures force political decisionmakers to give priority to activities that reach the largest number of voters. It is now known that Act 64 forces party committees, even without the newly-revived limits on party contributions and related expenditures, to concentrate more on mass media activities than grassroots activities. *See 2001 Memorandum, supra*; *Campaigns Meant Cash for Vermont Media*, Associated Press, Nov. 10, 2000 ("'That was one of the unintended consequences of the campaign finance law, that we saw much more spending on the media,' [Secretary of State Markowitz] said.").

b) <u>The Burden on Candidates' Speech</u>

The district court concluded that Act 64's limits on campaign expenditures are based on past experience and, with limited exceptions, are substantially the same as average expenditures by candidates in the past. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 471-72 (D. Vt. 2000). Putting aside for purposes of argument that expenditure limits are *per se* unconstitutional under *Buckley*, the level of the limits set by Act 64 clearly places unconstitutional restraints on the speech of candidates for office. First, past experience is no guide. Second, average spending in past elections is a standard that strongly favors incumbents and imposes a one-size-fits-all philosophy that severely constricts debate in the most important elections. Third, Act 64's spending levels are so low that, combined with the draconian restrictions on party spending, they will drastically reduce political debate in Vermont.

1) Past Experience

A) Inaccuracy of Reports From Past Elections

It is impossible to determine the level of *relevant* campaign spending by Vermont candidates in the past, that is, "expenditures" using Act 64's definitions. It is not altogether clear what evidence the district court specifically considered in reaching its conclusions. However, on the face of the district court's decision, it appears that the court relied heavily on testimony, some of which was conflicting, *see id.* at 470-72, and did not scrutinize in detail documentary evidence of past practices.

More significantly, even the candidate disclosure reports filed under Vermont law for past elections will vastly understate the level of spending when Act 64's two-year election cycle and its new and much broader definitions of expenditures and related expenditures are used. There are some expenditure reports in the Trial Exhibits, but they are limited to particular candidates' out-of-pocket expenditures made during a "campaign." *See, e.g.*, Trial Exs. vol. IV at E-1311 (Campaign Finance Report of Peter Brownell). Act 64's limits on expenditures, however, apply, as noted, to all expenditures made over a two-year period immediately following the last general election and ending with the next general election. *See* Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805a(a).

Furthermore, under prior law, there was no provision regarding related expenditures. There was, therefore, no reason even to collect information on, much less to calculate and report, related expenditures by supporters and political parties. In particular, there was no reason to calculate the value of in-kind related expenditures by supporters, such as mileage, all of which count toward the expenditure limits under Act 64. Finally, there was also no need under prior law for candidates to segregate and calculate expenditures on their behalf by party committees, likely a huge amount. *See infra* note 19 and accompanying text. The value of such support must be treated under Act 64 as a candidate

expenditure. *See* Vt. Stat. Ann. tit. 17, § 2809(d).

We know only one thing for certain: what candidates deemed to be expenditures in the past -- generally direct cash expenditures out of a campaign's checking account -- will be vastly less than what must be so regarded under Act 64's definitions of expenditures and related expenditures.

There is another reason why prior spending is not a reliable guide for the needs of campaigns operating under Act 64. Act 64 imposes substantial costs of compliance with its terms that were not encountered under the prior law. As noted, Vermont 's Secretary of State has indicated that most candidates will be unable to proceed safely without legal advice, *see Appendix A*, and candidates running for statewide office may need the services of an accountant as well. In the case of legislative candidates, legal assistance alone could literally exhaust all the expenditures -- *e.g.* $2,000 for House candidates -- allowable under Act 64. Again, such assistance from a candidate's political party will be limited because retention of counsel by a party organization to help candidates would be a related expenditure allocable to individual campaigns.

Much time and possibly much support staff will also be consumed by the need to monitor, coordinate, and control related expenditures by supporters that must be charged to the campaign. Finally, some candidates may encounter costs in bringing and defending lawsuits concerning the myriad of interpretive questions that will arise as a result of Act 64's ambiguous provisions.

B) Inadequacy of Average Spending in Past Elections as a Constitutional Standard

The district court deemed the average campaign expenditures in past elections to be a relevant legal guide, *Landell v. Sorrell*, 118 F. Supp. 2d at 471-72, and my colleagues agree, *see* Maj. Op. at 66.

However, even if accurately determined using Act 64's definitions, the use of average expenditures in past elections inevitably yields expenditure levels that strongly favor incumbents. First, incumbent legislators in Vermont and elsewhere have ample advantages over challengers under spending limits, discussed *infra*, and therefore prefer low limits. Second, the average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all -- elections in which little communication took place and little was spent. *See* Trial Exs. vol. III at E-0967 (appellees' expert's calculation of average expenditures, which includes low-spending candidates whose spending is unknown by assuming they spent $500, the maximum allowed before filing is required). It is altogether possible, therefore, that the average expenditure in past elections is less than the amount spent by every candidate who ran in a seriously contested race and perhaps even probable that it is less than the amount spent by any challenger who successfully challenged an incumbent.[17] Average past spending therefore has little relevance unless the goal is to disadvantage challengers.

The use of average past expenditures is inappropriate

[17] For example, the 1974 Federal Election Campaign Act, the subject of the challenge in *Buckley*, set the limits on expenditures for House of Representative candidates in general elections at $70,000. *See* 424 U.S. at 55. Adjusted for inflation, this limit was below the amount spent by every successful challenger to a House incumbent in the 1972 election. *See* Joint Appendix at 269-318, *Buckley* (Nos. 75-436 and 75-437). Nevertheless, the $70,000 limit was far above the average expenditure by House candidates in 1972, $39,884. *See id.* at 447.

for other reasons. The average will reflect only past patterns of citizen behavior in acquiring political information and prior methods of candidate communications with citizens. When citizens congregate in very large numbers for frequent community events, those events may well be effective vehicles for candidate communication with voters. When large community events become less frequent or less important in peoples' lives and voters turn to other sources to acquire political information -- some may rely heavily on a certain newspaper, some on particular radio or television stations, some on websites -- other means of communication, perhaps far more expensive, must be used by candidates for effective communication.

Part of the problem is simply the one-size-fits-all philosophy of expenditure limits. Different legislative districts may require different modes of communication. Geographic size, the existence and nature of local newspapers, radio and television stations, demographic factors, the issues, and so on, all affect the costs of communication with voters and may do so differently in many districts for the same legislative house.

Moreover, because the one-size-fits-all philosophy fails to recognize the differences between elections, it strikes at the heart of democracy. The view that there is an average election that can serve as the compulsory norm for all elections is quite dangerous, even apart from its pro-incumbent bias. Past averages have almost nothing to do with the communication needs in elections in which candidates strongly disagree over issues that divide large portions of the public and a clear-cut attempt is being made to alter government policies on those issues.

It is the non-average election that is often the historic election, one in which the outcome is heavily contested, the debate is most widespread, the public interest is at its

highest, and the most money is spent. Such an election was the New Hampshire primary of 1968, in which Eugene McCarthy, later a plaintiff in *Buckley*, badly damaged a sitting President in a debate over the Vietnam war in one of the most heavily financed primary races in history. McCarthy spent a then-unprecedented $12 per vote received in that single primary. *See* George F. Will, *Rules to Keep the Rascals In*, Newsweek, Jan. 26, 1976, at 80.

Vermont had a similar election in 2000, in which civil unions and other divisive issues were at stake. See Ellen Goodman, *Vermonters Are Caught up in a Civil War over Civil Unions*, Boston Globe, Nov. 2, 2000, at A27; Tom Puleo, *Governor's Race Tests Vermont Values; "Gay Marriage" Issue Is Monopolizing a Bitter Battle*, Hartford Courant, Oct. 30, 2000, at A1. More money was spent in the 2000 election than in any prior Vermont election. *See Lawmakers To Revisit Campaign Finance Law*, Associated Press, Nov. 14, 2000 (noting that the 2000 gubernatorial campaigns set the record for money spent); *see also* Ross Sneyd, *Campaign 2000 Involved Lots of Spending*, Associated Press, Dec. 18, 2000 (describing record spending levels for many elections across Vermont in 2000).

McCarthy's New Hampshire campaign of 1968 had national significance, while the 2000 Vermont gubernatorial election had unquestioned state, and possibly national, ramifications. Both involved unprecedented citizen participation. *See 2000 General Election Results for Gubernatorial Race*, *available at* http://cgi.sec.state.vt.us/cgi-shl/nhayer.exe ("*2000 Election Results*") (showing that voter turnout increased in Vermont by 34.5% in the 2000 election compared to previous election); Hugh Gregg, *A Tall State Revisited*, at app. (1993), *available at* http://www.politicallibrary.org/TallState/1968dem.html. And both involved, not surprisingly, unprecedented campaign spending.

C) Evidence of Contested Elections in Vermont

Campaign finance reports of Vermont candidates provide ample evidence, of which we may take judicial notice, Fed. R. Evid. 201; *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court can take judicial notice of records filed with the SEC), that contested elections in Vermont involve spending well in excess of Act 64's limits, *even without including related individual and party expenditures*. In the last two gubernatorial elections in Vermont, the major party candidates reported expenditures in amounts that were double or almost triple Act 64's limits. *See Campaign Finance Report of Howard Dean*, Dec. 18, 2000;[18] *Campaign Finance Report of Ruth Dwyer*, Dec. 18, 2000; *Campaign Finance Report of Doug Racine*, Dec. 14, 2002; *Campaign Finance Report of Jim Douglas*, Dec. 16, 2002. Moreover, even a third party candidate for governor exceeded the limits in one election, *Campaign Finance Report of Anthony Pollina*, Dec. 18, 2000, and another third party candidate came within a whisker of the limits in the next gubernatorial election, *Campaign Finance Report of Cornelius Hogan*, Dec. 16, 2002. In the last race for Lieutenant Governor, both major party candidates and a third party candidate exceeded the limits by 63%, 40%, and 38% respectively. *See Campaign Finance Report of Peter Shumlin*, Dec. 14, 2002; *Campaign Finance Report of Brian*

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[18] When Howard Dean, the Vermont governor whose rallying cry for Act 64 is quoted in the opening paragraph of my colleagues' opinion, ran for the Democratic nomination for President, he rejected public financing so that he could spend unlimited amounts. He made that decision at a time when all of his Democratic opponents were abiding by spending limits -- *i.e.* no "arms race." Although exact numbers are not available, Dean's rivals estimated that he spent as much as $6 million in the neighboring state of New Hampshire. Mike Madden, *Democrats Scrambling For Cash As Well As Votes*, Gannett News Service, Jan. 31, 2004.

E. Dubie, Dec. 1 6, 2002; *Campaign Finance Report of Anthony Pollina*, Dec. 16, 2002.

The factual support for the conclusion reached by my colleagues -- that contested elections will not be substantially affected by Act 64's limits -- is found largely in opinion testimony offered by proponents of the Act. The already slim value of that testimony is further undermined by the fact that many of those witnesses, when they ran for office, actually exceeded Act 64's limits in contested elections, again not counting related expenditures by individuals and parties. *See Campaign Finance Report of Anthony Pollina*, Dec. 18, 2000 (spent $335,412.46 in Governor's race, with expenditure limit of $300,000); *Campaign Finance Report of Cheryl Rivers*, Dec. 18, 2000 (spent $19,290.39 in senate race, with expenditure limit of $9,000); *Campaign Finance Report of Elizabeth Ready*, Dec. 18, 2000 (spent $77,313.47 in auditor's race, with expenditure limit of $45,000, and outspent opponent by 20%, although she had testified at trial that she would abide by Act 64's limit in that race); Trial Tr. vol. IX, at 147-51 (Elizabeth Ready) (testifying that she exceeded the current expenditure limits in four of her six senate races). In the view of some of these witnesses, of course, contested elections are "arms races" that should be prohibited. *See* Trial Tr. vol. IX, at 147-151 (Elizabeth Ready). *See infra* Part V (d) (1).

2) Effect of Act 64's Expenditure Limits on Candidates

Act 64's expenditure limits will, therefore, greatly hamper Vermont candidates in getting their message to the public. The Secretary of State has noted that the expenditure limit for State Treasurer -- $45,000 -- leaves, after advertising, "no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, *Dems Needle Each Other On Spending in Treasurer's Race*,

Associated Press, May 29, 2002. Expenditure limits should be expected to have precisely such effects because they force candidates to give exclusive priority to the methods of communication that reach the greatest number of voters.

The Secretary of State has also noted that the "tight contribution limits" of Act 64 were part of the cause of an "unprecedented amount" of independent expenditures in the 2000 Vermont election. *See 2001 Memorandum*, *supra*. As a result, candidates complained that "mailings or advertisements made on their behalf attributed to them opinions they did not hold, or sent negative messages about their opponent, in violation of their stated intent to run a positive campaign." *Id.* Expenditure limits will encourage even more extra-campaign spending and leave candidates without the means to set the record straight.

Even grassroots "meet the candidate" events in supporters' homes are severely limited, *see 1999 Memorandum*, *supra*, as noted above, and, although my colleagues mention, among other things, town barbecues and dinners as cheap but effective campaign methods, *see* Maj. Op. at 64, the nature -- when and where held and how often in the campaign season -- usefulness -- what kind of voters and in what numbers attend -- cost -- who pays -- and legal status under Act 64 -- an "expenditure" or "related expenditure" -- of these events is not elaborated in the record or discussed in my colleagues' opinion, notwithstanding the critical role such factors logically play in their opinion's analysis. In fact, these methods may be neither cheap -- at least by Act 64's meager standards -- nor effective.

There is, therefore, simply no data in the record suggesting that anything other than a drastic reduction of political speech will result from Act 64's expenditure limits. Indeed, the effect will likely be much harsher than most would expect for the reasons that follow.

First, low limits exacerbate the highly discriminatory and arbitrary effect of Act 64's selection of a two-year cycle. In a single-member Vermont House district, a candidate may spend --counting related individual and party expenditures -- only $2,000 over the two-year cycle. Vt. Stat. Ann. tit. 17, § 2805a(a)(5). A candidate who seeks to comply fully with Act 64 will be severely constricted. Any legal fees will count toward that limit. *Id.* § 2801(3). Mileage and other expenses of supporters can quickly eat up the spending allowed. A candidate who has to run in a contested primary election may well be unable to communicate with the public at all -- literally stuck in his or her driveway -- in a general election against an opponent whose campaign is just beginning.

Second, the harshness of the limits on candidate expenditures is greatly exacerbated by the fact that a candidate's campaign cannot expect the candidate's party to provide the usual supplemental support of polls, offices, computers, phones, advertisements, mailings, and other events, such as a party-funded booth at a country fair, if the conduct "primarily benefits" fewer than seven candidates. *See supra* notes 12, 14. Parties may make contributions and related expenditures benefitting candidates that total, over a two-year period, no more than $400 for each candidate for statewide office, $300 for each candidate for the Senate, and $200 for each candidate for the House. *See supra* Part III(b)-(c). In Vermont, there are six statewide offices, thirty State Senators, and 150 State Representatives. Under Act 64, a political party -- the state party and all affiliates combined -- can, over a two-year period, make a total of only $41,400 in contributions to, or related expenditures on behalf of, *all* its candidates for non-federal office.

Although *Colorado II* allows such restrictions, 533 U.S. at 465, their effect must be considered in gauging the impact of candidate expenditure limits. A statewide poll regarding candidates for the six statewide offices would cost

over $6,000. *Letter from Mark F. Michaud, Vermont Democratic Party, to Vermont Attorney General William Sorrell* 1 (Feb. 28, 2002). If the poll data were shared with the six candidates, the poll would exceed Act 64's limits ($400 by 6) by over 100%. *See Appendix A*. The full effect of Act 64's limits has, of course, not been experienced yet,[19] because the district court invalidated candidate expenditure limits and the contribution/related expenditure limits on political parties. With these limits now revived, limits on expenditures by candidates will dramatically lessen political debate in Vermont.

Finally, as noted, Act 64's one-size-fits-all approach makes no provision for candidates to adjust to economic, demographic, cultural, or technological changes that increase the costs of campaigns. Although Act 64 is premised on the view that elections are "too expensive" -- a view expressly rejected as a valid reason for expenditure limits in *Buckley*, 424 U.S. at 57 --and that candidates can make them cheaper, the "costs" of campaigning are not within the control of candidates.

The costs of resources to be used in campaigns are determined by competitive markets. Resources used in campaigns are also used, and far more extensively, for non-political communication. The prices of those resources are therefore set in markets that are independent of political campaigns and in which candidates for office must compete with non-political consumers. An inability to pay market price for communication resources will stifle political speech. Nevertheless, there is no provision for future

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[19] For example, in the 2000 election, the Democratic Party made cash contributions -- *not including related expenditures* -- in the amount of $28,000 to Elizabeth Ready for her campaign for Auditor of Accounts. *See Campaign Finance Report of Elizabeth Ready*, Dec. 18, 2000. Under Act 64, cash contributions *and* related expenditures could not have exceeded $400.

inflation in Act 64's limits, although even slight annual increases in the consumer price index will in a few short years substantially reduce further the ability of candidates to communicate with voters. For example, the cost of postage stamps is now higher than when Act 64 was passed. *See It Now Costs 3 Cents More to Mail a First-Class Letter*, N.Y. Times, June 30, 2002, at 18. For another example, the price of gasoline has risen considerably since then. (The reimbursement rate for mileage driven by federal employees has been increased from 31¢ at the time of Act 64's passage to 37½¢ in July, 2004. *See* U.S. General Services Administration, *Privately Owned Vehicle Reimbursement Rates*, at http://www.gsa.gov (effective Jan. 1, 2004).)

As noted above, the effect of rising costs has already been observed by Vermont's Secretary of State. With regard to a campaign for State Treasurer -- with an expenditure limit of $45,000 -- she noted that, "The cost of paid media has changed quite a bit in the last four or five years. With prices for television ads, and even radio ads, running a campaign on $45,000 will leave you no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, *Dems Needle Each Other on Spending in Treasurer's Race*, Associated Press, May 29, 2002. It goes without saying that there also would be no room under the spending cap for grassroots activities that would have to be included as related expenditures.

Act 64 also does not take into account the fact that a combination of demographic, cultural and technological changes may require resort to ever more costly methods of communication. Campaigns may communicate with voters only by going to where voters are or using a medium watched or listened to by voters. My colleagues assume the existence of numerous public events in which large groups of voters frequently congregate and can be personally addressed. *See* Maj. Op. at 64. However, voters are not

required to abide by such assumptions and to congregate in great numbers at scheduled times during political campaigns or even to welcome an interruption of free time at home by a candidate's personal visit. Rather, they may prefer to get their information through technology that puts candidates at the mercy of a competitive market and technological advances.

For example, because the development of cable television broadened viewership opportunities for the public, it also required candidates who wished to communicate through television to buy ads on many, instead of a few, channels. For another example, the development of the Internet has made it possible for candidates to offer websites to provide information to potential voters, a fantasy fifteen years ago. The Executive Director of the Vermont Democratic Party has opined that a candidate website is now "a necessity." Nancy Remsen, *Election Notebook 2002*, Burlington Free Press, Sept. 9, 2002, at 1B.

Act 64 takes a Luddite view of political communication --one witness for the defense even suggested the bicycle as a means of travel in campaigns, Trial Tr. vol. IX, at 134 (Elizabeth Ready) -- and prevents candidates from adjusting to new demographic and cultural patterns and costs, even though the Supreme Court has expressly declared that government is not to make that choice. *See Meyer*, 486 U.S. at 424; *Buckley*, 424 U.S. at 57.

c) The Burden on Challengers

The fact that limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents is recognized both in the provisions of Act 64 -- which has slightly lower limits for incumbents -- and in its legislative history. *See, e.g., Hearing on H. 28 Before the Vt. House*

Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Rep. Terry Bouricius); *Hearing on H. 28 Before the Senate Comm. on Gov 't Operations*, 64th Biennial Sess. (1997) (statements of Sens. Seth Bongartz and Jean Ankeney). The Supreme Court has also noted that limits on candidate expenditures may "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Buckley*, 424 U.S. at 57.

Incumbents in effect have capital -- name recognition, an existing organization, tested donor lists, etc. -- to draw upon without making expenditures as defined in Act 64, while virtually every significant capital-building activity by newcomers requires the use of resources that count toward the expenditure limits. Equally important is the fact that incumbents have methods of getting their name before the public that are not limited by Act 64, while challengers do not.

To take an example from Vermont, the State Treasurer, an elected official, publishes newspaper ads at state expense listing names of Vermonters who may have funds in dormant bank accounts, unclaimed insurance refunds, or unclaimed stock dividends. These ads have contained photos of the incumbent Treasurer and have run in the October of election years. In 2001, the ad read, "Jim Thompson, Vermont state treasurer, may have money for you." *Treasurer .Candidates Show Signs of Restraint*, Burlington Free Press, Sept. 23, 2002, at 1B. To take another Vermont example, whereas a challenger to an incumbent Secretary of State can obtain a Madison Avenue-type website only by spending money counted as an expenditure, the incumbent can use state funds for such a site, and post on it materials casting a favorable light on the incumbent, omitting only the words "Vote for me." *See Vermont Secretary of State's Website*, at http://www.sec.state.vt.us; *Office of the Attorney General Website*, at

http://www.atg.vt.us; *see also supra* Part III(c). Moreover, the Secretary's political party provides visitors to its site a link to the Secretary's site. *See supra* Part III(c).

The term "arms race" has acquired an almost talismanic quality in the course of this litigation, serving as a quip that answers every concern about Act 64's effect on political speech. In fact, however, slogans about stopping the "arms race" are often cover for the disarming of challengers. *See infra* Part V(d).

For example, one of the witnesses whose testimony is relied upon heavily by my colleagues, Maj. Op. at 40-41, 42, 50, 51, 58-59, 65 is a very successful electoral official in Vermont who testified to the "arms race" at the State Senate level, Trial Tr. vol. IX, at 147, 150 (Elizabeth Ready). As an incumbent and undoubtedly well-meaning supporter of Act 64's limits, which she had exceeded (not including related individual and party expenditures) in most of her (always successful) campaigns, *see id.* at 147, *supra* Part IV(b)(1)(C), she testified that she had been forced to make larger expenditures because her opponents ran advertisements and posted yard signs that gained the attention of voters. She was then compelled to do the same, instead of relying on her preferred campaign method of person-to-person contact, because voters seeing her opponents' ads and yard signs wondered whether she was running for reelection. *See id.* at 147-48. In her view, the "arms race" forcing her to run ads and post yard signs should be stopped.

So used, "arms race" is a pejorative term that refers to contested elections in which challengers spend resources to run serious campaigns. Incumbents do not restrain their own acquisition and use of perquisites of office that help them win reelection, but these perquisites are never mentioned as part of the "arms race." For example, the

witness described above, who offered yard signs as evidence of an "arms race," now holds the elected post of State Auditor with a website that has her photo and various pages listing her goals and accomplishments. *Office of the Vermont State Auditor Website*, at http://www.state.vt.us/sao. To boot, the Vermont Democratic Party website offers visitors a link to the Auditor Website. *See supra* Part III(c). Expenditure limits therefore stop "arms races" by challengers, leaving incumbents with ample weapons.

Moreover, Act 64's selection of the two-year cycle as the governing time period collapses primary and general elections under one expenditure limit and will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle.

The degree of the adverse effect of Act 64 on challengers will depend in large part on discretionary, arbitrary, and often *ad hoc* rulings on what kinds of activities and speech by incumbents will be deemed to be official communication by officeholders to the public and what kinds will be deemed to be campaign expenditures. Of course, virtually every activity by an incumbent officeholder intending to seek reelection will have a political effect, and such officeholders will to one degree or another take that effect into account in determining their behavior. The law provides for marginally lower limits on expenditures by incumbents, but this largely inconsequential difference will be rendered irrelevant so long as the substantial communications by incumbents are not deemed campaign expenditures. Conversely, the advantage of incumbents under the Act's limits will also depend on what activities by non-announced challengers are deemed to be by a "candidate" and "for the purpose of influencing an election." *See generally* Vt. Stat. Ann. tit. 17, § 2801(1), (3).

These issues, of course, will likely be addressed in the first instance by an incumbent official, the Secretary of State. *See 2001 Guide, supra*; *see also infra* Part V(e). Should these rulings be adverse to incumbents -- a not very likely scenario --the incumbents can overturn them by legislation. If the rulings favor incumbents, challengers have no such option.

Because the hands-off approach of my colleagues accords expansive deference to legislative judgments as to expenditure limits, *see* Maj. Op. at 36 & n.9, incumbents are given a weapon that can be manipulated as needed in the future. Should the limits of Act 64 prove inadequate and the "arms race" continue to result in ads and yard signs by challengers, they can be altered at will.[20]

Act 64's major factual premise is that Vermont incumbents so crave reelection that they ignore official duties and personal honor to that end. My colleagues abandon this premise in reassuring us that self-interest will not influence campaign finance regulation despite the considerable evidence that self-interest contributed, albeit

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[20] A low level of judicial scrutiny necessarily leaves legislators with discretion to alter campaign finance regulations to affect upcoming elections. We have seen an example of this in New Jersey, where a campaign finance law was deliberately changed in an (unsuccessful) attempt to bolster the candidacy of a new entrant into the race for Governor. *See* David M. Halbfinger, *Substitute Candidate, on Short Notice, Stakes Claim in Race for New Jersey Governor*, N.Y. Times, Apr. 27, 2001, at B5; David M. Halbfinger, *New Jersey Legislature Votes To Delay Primaries 3 Weeks*, N.Y. Times, Apr. 24, 2001, at B5. In Vermont, Governor Dean sought to use money reserved for the public financing of campaigns -- a key part of Act 64 -- to pay general state expenditures. *See State May Tap Campaign Finance Fund to Ease Budget Crunch*, Associated Press, Dec. 5, 2001.

below the public radar, to the level of expenditure limits set by Act 64 and to adoption of the two-year cycle.

Moreover, there is powerful evidence that self-interest will prevail. Incumbent legislators can exercise a direct influence on the outcome of elections in two ways: campaign finance regulation and reapportionment. The importance of self-interest is dramatically confirmed by the effect of legislative reapportionment on election districts for the United States House of Representatives, an area in which courts have deferred to legislative judgment. *See White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination.") (internal citation omitted); *see also Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Reapportionment of federal House districts now has one and only one guiding star: incumbent protection. *See* John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats*, Wall St. J., June 19, 2002, at A1 ("Thanks to the play-it-safe strategies of Republicans and Democrats alike, and to the sophisticated technology now used in redistricting, competition is being squeezed out of the House -- with huge consequences."); *id.* (describing the practice of "sweetheart " gerrymandering by incumbents of both parties); Richard Perez-Pena, *With 2 Congressional Seats Lost, Albany Begins Battling Over Who Must Go*, N.Y. Times, Jan. 22, 2002, at B1 . These sources demonstrate that reapportionment is now widely regarded as little but the "rigging" of elections in the name of the special interest -- incumbency -- that dominates legislative decisions. I know of no reason why the guiding star in reapportionment decisions will not become the guiding star in campaign finance regulation.

d) <u>The Burden on the Press</u>

As noted, the law does not exempt the media from the definitions of "contribution," "expenditure," or "related expenditure." Media support is a "thing of value" that, if "facilitated" or "solicited" by a candidate, would be a "related expenditure." *See* Vt. Stat. Ann. tit. 17, §§ 2801(3), 2809(c); *see also 2001 Guide*, *supra*. Indeed, as noted above, Vermont's Secretary of State has warned candidates that providing a photo, written materials, or "other assistance or information" to anyone for use in a publication will trigger a related expenditure. *See id.*

The extent of the burden imposed on the press by Act 64 is potentially vast, again depending largely on discretionary rulings by those who must administer Act 64. *See infra* Part V(e). Certainly, editorials or op-ed endorsement(s) of candidates fall directly within Act 64's language, as would publication of letters to the editor from a candidate, a campaign official, or even a supporter. One witness relied upon in my colleagues' opinion testified that she authored articles on issues for the press as a no-cost campaign tactic, Trial Tr. vol . IX, at 135 (Elizabeth Ready), but publication of these articles would clearly fall within the related expenditure language of Act 64. Media sponsorship of debates might also, particularly if some candidates were excluded or if some did not want to appear. Ordinary news stories about campaign events brought to a newspaper's attention by a candidate or campaign official, or even news reports on interviews with candidates, also fall squarely within the ruling by the Secretary of State described above. *See 2001 Guide*, *supra*.

None of this is inconsistent with Act 64's underlying philosophy. The theory underlying Act 64 would easily include the media as a powerful special interest having a stake in government action just like any other profit-making business or organized economic interest -- *e.g.*, the newspaper quoted by my colleagues is part of a huge multi-

national organization, undoubtedly one of the larger companies doing business in Vermont. *See Gannett Co. Inc. Operations*, *available at* http://www.gannett.com/map/units.pdf (listing The Burlington Free Press as a subsidiary). A candidate enjoying the editorial support of the local press, favorable coverage of his or her campaign events, and publication of his or her op-ed articles receives benefits bestowed at considerable expense, including past capital investment and current spending. Unless expenditure limits include the value of media support, an opponent who does not enjoy such support *and* labors under an expenditure limit exempting media support is in a real sense facing a candidate who is allowed to spend more because of a powerful economic supporter. Of course, unconstitutional restraints on the press are not validated by a need for fairness created by unconstitutional restraints on political candidates. *See infra* note 21.

However, many proposals to regulate campaign finance exempt the media, *see*, *e.g.*, N.Y. Elec. Law § 14-124; Conn. Gen. Stat. § 9-333w(c), often including a definition of what organs of communication constitute exempted media, *see e.g.*, Bipartisan Campaign Reform Act of 2002, § 201(f)(3)(B), Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 431 et seq.).[21] Nevertheless, Act 64

[21] Some may doubt that Act 64 was intended to apply to media editorializing because they deem such editorializing to be constitutionally protected. However, paid advertisements have the same protection as editorials, *see Sullivan*, 376 U.S. at 266 (holding that "statements [that] would otherwise be constitutionally protected . . . do not forfeit that protection because they were published in the form of a paid advertisement"), and if government may constitutionally limit paid advertisements, as Act 64 does, government may limit unpaid endorsements. I, of course, believe that government cannot limit either.

The reason many campaign finance laws exempt the media is, therefore, not constitutional scruple, but the desire of proponents of regulation for media exposure and support. Such support might not be forthcoming if

does not contain such an exception. Given the plain language of Act 64 and the consistency of its theory with that language, Act 64 can fairly be said to burden the press, and any candidate who seeks its support, quite as much as the Act burdens other candidates and their supporters.

e) The Burden on Party Affiliates

As noted, Act 64 treats a contribution to a state, county or local party affiliate as a contribution to all affiliates, and requires that all such monies be deposited in a single bank account. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *see also supra* note 1.

My colleagues note that "the local and state affiliates will now have to record and coordinate their contributions," but reassure us that "the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform." Maj. Op. at 88. Of course, under Act 64, the "campaign finance realm" is not some incidental, out-of-the-way matter but covers virtually every organizational activity, including even the cost of charcoal, hotdogs, hamburgers, and soft drinks for a town committee picnic. Moreover, the "record[ing] and coordina[tion]" is required to be done through a single bank account. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *supra*, note 1. If a party town committee wants $50 for a picnic, it must petition the state party official authorized to sign checks from the statewide account to obtain the only money that can legally pay for those items. Local party-funded booths at country fairs were mentioned

the media realized the extent to which the theory of such laws is a dagger easily aimed at freedom of the press.

as a person-to-person method of campaigning by one witness relied upon by my colleagues, *see* Trial Tr. vol. IX, at 138 (Elizabeth Ready), but such funding must also come from the statewide account.

By requiring that the recording and coordination of all party financing be done through a statewide party organization that parcels out funds, Act 64 not only disrupts but revolutionizes the organization of American political parties and their critical role in a free society. The centralizing of party funding will of course make all grassroots political activities by local party affiliates -- the indispensable stuff of American politics -- subject to the whim of state party officials. In fact, when the Vermont Secretary of State ruled that a contribution to one party organization constituted a contribution to all affiliates, both Republican and Democratic state leaders registered shock -- another example of the lack of scrutiny given the actual provisions of Act 64 -- and opined that grassroots activities would be severely inhibited. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (noting one political operative's stunned response as being "Someone's totally taken leave of their senses").

V. THE CONSTITUTIONAL RESOLUTION

Some of Act 64's severe limitations on political advocacy are unconstitutional because no governmental interest, much less a compelling interest, has been offered to justify them. These include the two-year cycle for limits on contributions and expenditures, *see* Vt. Stat. Ann. tit. 17 §§ 2801(a), 2805(a), 2805a(a), the forced centralization of local party affiliates, *see id.* §§ 2801(5), 2831, and the imposition of expenditure limits on candidates' self-funded campaigns, *see generally id.* § 2805a(a).

Even if expenditure limits may be constitutionally enacted notwithstanding *Buckley's* holding to the contrary, Act 64's limits are so low that they are unconstitutional by any reasonable test. Indeed, they survive in the present case only by my colleagues' creation of a standard that allows legislatures to adopt low, incumbent-protecting limits.

With regard to the governmental interests asserted as justifications for Act 64,[22] my colleagues rely upon two in particular: government's interests in eliminating corruption or the appearance thereof and in affording candidates more time to spend with non-donor voters. *See* Maj. Op. at 53-55. As discussed in my colleagues' opinion, however, these interests are broadly defined and include eliminating special access or the appearance of special access of donors to officeholders, reducing the influential or agenda-setting effect of "bundled" contributions, and increasing citizen confidence in the electoral process. *See id.* at 38-55; *see also* 1997 Vt. Laws P.A. 64 (H. 28). All of these interests were rejected by the Supreme Court in *Buckley*, 424 U.S. at 25-26, but, even if they had not been, they have not been demonstrated in the present case as having a constitutionally sufficient nexus to the limits on candidate expenditures and related expenditures.

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[22] My colleagues note that one purpose of Act 64's expenditure limits was to reduce the use of short commercials by candidates but, in light of their disposition of this matter, do not reach the issue of whether this concern is sufficiently compelling to justify the legislation. In that regard, I note two things. First, that interest is not compelling. Indeed, the use of law to force candidates to select one medium of advocacy rather than another is an unconstitutional purpose limits down. *See Meyer*, [individuals'] right not and an additional ground for striking expenditure 486 U.S. at 424 ("The First Amendment protects only to advocate their cause but also to select what they believe to be the most effective means for so doing."). Second, Act 64 has increased reliance on the media. *See 2001 Memorandum, supra*; David Gram, *Dems Needle Each Other on Spending in Treasurer's Race*, Associated Press, May 29, 2002.

a) Restrictions on Political Activity for Which No Governmental Interests are Asserted

As to some of the restrictions on political activity imposed by Act 64, no governmental interest whatsoever has been proffered as a justification. Absent the assertion of a justifying governmental interest, any significant restraint on political speech should be struck down as *per se* unconstitutional. *See* Eu, 489 U.S. at 222 ("If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.")

First, no reason is offered for the adoption of the arbitrary and highly discriminatory two-year cycle for limiting contributions and expenditures. *See* Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805(a), 2805a(a). A two-year cycle does not reduce the influence or access to officeholders of special interests, reduce time pressures on candidates, or increase citizen or voter confidence in government. Act 64's public financing provisions recognize the self-evident need for greater financing on the part of those who must run two campaigns rather than one. *See id.* §§ 2855(a), (b). Collapsing primary and general elections under a single expenditure limit is thus a flat-out suppression of speech for no asserted reason, save perhaps for the unspoken reason of incumbent protection, as discussed *supra.*

Similarly, no justification or governmental interest is offered for Act 64's treatment of a contribution to any party affiliate as a contribution to all affiliates, with the statutory requirement that all contributions to, and thus, expenditures by, all party affiliates -- state and local -- be from a single bank account. *See id.* §§ 2801(5), 2831; *supra* note 1. Because Act 64 limits contributions to, and related expenditures on behalf of, particular candidates by political parties on an aggregated basis, contributions to separate

affiliates cannot serve as a conduit allowing individuals to evade the limits on single source contributions. *See Colorado II*, 533 U.S. at 464-65 (permitting restriction of coordinated party expenditures to minimize circumvention of contribution limits). Neither the interests in eliminating corruption, saving candidates' time, nor increasing confidence in government are therefore served by aggregating contributions to affiliates of political parties.

While serving none of Act 64's asserted goals, the aggregated treatment of contributions to affiliates eliminates the right of local committees to be free from centralized control in raising funds for local party-building activities. One of the most vital and fertile areas of democratic political activity in America is the local party committee, which, while loosely related to larger party organizations, is the source of grassroots activities that permit citizens to participate and seek change. Local party activities are a critical means by which a changing public opinion is absorbed gradually into the political system, rather than going unheard until it reaches explosive force. Because these activities require funding, Act 64 directly impairs them. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (noting that leaders of both parties warn that "the ruling would have the effect of undermining the goal of Vermont's new campaign finance law to encourage more grassroots political activity"). *See supra* Part IV (a).

Freedom of association includes the right not only to engage in group activities but also to affiliate groups with one another, on a horizontal, vertical, or hierarchical basis, loosely or with centralized control. The choice is to be made by the citizens involved, not by government. *See Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 424; *Buckley*, 424 U.S. at 57.

Finally, no reason is given for applying expenditure limits to candidates who desire to fund their own campaigns. *See generally* Vt. Stat. Ann. tit. 17, § 2805a(a). Such candidates already have "access" to themselves and need not spend excessive time fund-raising. Again, speech is suppressed for no reason. *See Buckley*, 424 U.S. at 44-45.

b) *Buckley* Forecloses the Asserted Justifications for Expenditure Limits

Turning to the reasons given by my colleagues as constitutional justifications for expenditure limits, each of them has already been considered and rejected by the Supreme Court. *Buckley* rejected in the most explicit terms the notion that government may, under a Constitution containing the First Amendment, limit the amount of political speech by candidates and ordinary citizens. *See id.* It is no surprise that many of the arguments made in favor of Act 64 rehash those considered in *Buckley* because Act 64 was intended by its proponents as a vehicle to overturn the *Buckley* ruling. *See 2001 Memorandum*, *supra*; *Hearing on H. 28 Before the Vt. House Comm. on Local Gov't*, 64th Biennial Sess. (1997) (statement of Anthony Pollina); *Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations*, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., *Report on Campaign Finance*, H. 28, 64th Biennial Sess. (1997).

For example, the question of special donor access or the appearance thereof was highlighted both by the Congress that enacted the expenditure limitations struck down in *Buckley*, *see Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090* (July 30, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 749 (1977), and by the Court of Appeals for the District of Columbia, which upheld those limitations and was reversed in *Buckley*.

Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), *aff'd in part* and *rev'd in part*, 424 U.S. 1 (1976). That court expressly noted that "[l]arge contributions are intended to, and do, gain access to the elected official," *id.*, an observation interchangeable with language in my colleagues' opinion. To be sure, the Supreme Court did not use the word "access" in *Buckley*, but it did use the stronger term, "improper influence." *Buckley*, 424 U.S. at 27, 45-46. Having held that corruption itself or the appearance thereof -- bribes -- was not sufficiently compelling to justify limits on expenditures by candidates, *id.* at 55, the Court hardly had to go on to say that access or the appearance of access -- returning or taking a phone call from a donor -- was also not compelling. Reducing bribes is generally regarded as a far more compelling interest than reducing phone calls.

It is also suggested that the practice of bundling contributions by those with common interests justifies expenditure limits. My colleagues assume that the practice of bundling was unknown at the time of *Buckley*. Maj. Op. at 43.[23] However, the concept of pooling contributions by

[23] My colleagues cite a Sixth Circuit concurrence for the proposition that *Buckley* was "'decided on a slender factual record,'" Maj. Op. at 27 (citing *Kruse v. City of Cincinnati*, 142 F.3d 904, 919 (6th Cir. 1998) (Cohn, J., concurring)). To this they add citations to a treatise, a law review article, and a student note for the proposition that *Buckley* was decided without a "factual" record. The authors of these works could not have been familiar with the actual record before the Court in *Buckley*, which contained over 700 pages of statistical and testimonial data and findings of fact, as described below. Those materials are a matter of public record, and the *Buckley* briefs and oral arguments can be found in a published, two-volume work. *1976 Landmark Briefs and Arguments of the Supreme Court of the United States: Buckley v. Valeo* (Phillip B. Kurland and Gerhard Casper, eds. 1977) (hereinafter "*Landmark Briefs*").

Buckley involved a major piece of legislation passed after extensive congressional hearings in which critics of the private financing of elections supported their case with massive submissions of evidence.

Legislative History of Federal Election Campaign Act Amendments of 1974, The Federal Election Commission (1977). The Supreme Court's decision indicated familiarity with this body of evidence. *See, e.g.*, *Buckley*, 424 U.S. at 20 nn. 20-21 (giving election-related statistics); *id.* at 22 n.23 (same); *id.* at 26 n.27 (same). Other materials before the Supreme Court in *Buckley* include, *inter alia*, a Joint Appendix of 762 pages, which compiled findings of fact and statistical findings agreed to by the parties, Joint Appendix at 4-698, *Buckley* (Nos. 75-436 and 75-437), and the district court's findings of fact, *id.* at 699-753.

The agreed upon findings of fact included data from opinion polls on public perceptions of politicians, political participation, expenditure limits, and cynicism about government, *id.* at 160-89, 207-53, detailed catalogs of specific contributions by labor unions, PACs, and business organizations to individual candidates, *id.* at 55-146, data on expenditures in presidential elections from 1912 to 1968 indicating increasing spending and an increasing cost per vote, *id.* at 50-51, the cost of postage and newspaper advertising, *id.* at 29-32, advantages of incumbents over challengers, *id.* at 16-24, statistics indicating declining voter participation, *id.* at 9, evidence that candidates generally focused on wealthy donors but that candidates who limited their expenditures had been successful in the past, *id.* at 256-59, and evidence that elected officials give preferential access to large contributors, *id.* at 256-57.

The agreed upon statistical findings included data on and analysis of contributions to, expenditures by, and election results for, all congressional candidates and political committees that filed reports in the 1972 and 1974 elections, *id.* at 270-440, 571-72, 619-78, votes received by challengers versus incumbents in the 1974 House races, *id.* at 679-96, evidence of specific individuals and groups donating money to congressional candidates on committees relevant to their businesses, *id.* at 462-64, 467-72, statistics on independent expenditures, *id.* at 472-73, data on individuals who contributed large sums to 1972 congressional elections and the Committee to Reelect the President, *id.* at 479-564, a detailed analysis of the 1972 elections which discussed, among other things, the costs of raising money from large versus small donors and the relationship of expenditures to success in elections, *id.* at 571-586, and a ten volume study by Common Cause entitled *1972 Congressional Campaign Finances*, *id.* at 698.

The *Buckley* district court's findings of fact were based on the testimony and affidavits of fifteen individuals, and basically summarized that testimony. *Id.* at 699. These findings included opinions on the

persons with common interests is hardly new. Indeed, at the time of *Buckley*, proponents of the 1974 Act relied heavily on pooled contributions by various firms in particular industries as evidence of improper influence. *See Senate Floor Debates on S. 3044* (Mar. 28, 1974, Apr. 3, 1974) (statements of Sens. Griffin, Baker), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 259, 365-66 (1977); *House Floor Debates on H.R. 16090* (Aug. 8, 1974) (statement of Rep. Dickinson), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 917 (1977). An amendment in the House that would have prohibited pooling was introduced, voted on, and rejected. *See Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090* (July 30, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 752-53 (1977); *House Floor Debates on H.R. 16090* (Aug. 7, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 858-59 (1977).

This was all explicitly before the Supreme Court in *Buckley*. In fact, "bundling" was considered so significant

importance of seed money to challengers, *id.* at 703, 714, the ways in which expenditure limits favor incumbents over challengers and third party candidates, *id.* at 727-33, 713-19, indices of success other than winning or losing, *id.* at 712, and the ability to run a successful campaign with little money, *id.*

In *Buckley*, therefore, the Court had before it extensive hard data regarding contributions to, and expenditures by, candidates for federal offices, as well as a multitude of reflections and opinions on the role of money in campaigns by persons familiar with American electoral politics. Moreover, the defense in *Buckley* included not only the government but also various groups, including Common Cause and the League of Women Voters, who were allowed to intervene as full parties and were represented by the Washington law firm, Wilmer, Cutler, and Pickering and by Archibald Cox of the Harvard Law School, a former Solicitor General of the United States.

that the findings of the *Buckley* district court as to large contributions cataloged them by industry as well as by individual donor. *See* Joint Appendix at 86-143, *Buckley* (Nos. 75-436 and 75-437). In particular, much attention was given at the time of *Buckley* to the 1972 campaign contributions by the dairy industry, in which milk producers pooled a large sum and then broke it down into contributions by small committees to avoid disclosure. *See Senate Floor Debates on S. 3044* (Mar. 26, 1974, Mar. 27, 1974, Mar. 28, 1974, Apr. 3, 1974, Apr. 4, 1974) (statements of Sens. Hathaway, Griffin, Hollings, Baker, Kennedy), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 205, 225, 257, 365, 376-77 (1977). This incident was a highly publicized scandal at the time. It was featured in the Court of Appeals decision that upheld expenditure limits, *Buckley*, 519 F.2d at 839 n.36, and that was reversed by the Supreme Court, *Buckley*, 424 U.S. at 55. Finally, an example of "bundling" was mentioned during the oral argument in the Supreme Court in *Buckley*. *1976 Landmark Briefs and Arguments of the Supreme Court of the United States: 2 Buckley v. Valeo* 729 (Phillip B. Kurland and Gerhard Casper, eds. 1977) (appellees' argument that disclosure of small contributions necessary because of "the problem of culminating, of combining contributions, if you have a large number of people who are affiliated"). The term "bundling" may be new, therefore, but the concept is long in the tooth.

My colleagues now emphasize a governmental interest mentioned only in passing in their original opinion, the belief that expenditure limits will reduce the time spent fundraising by candidates, with the hope that the extra time will be spent conferring with ordinary citizens. Maj. Op. at 45-55. This justification overlaps with the access issue and, to that extent, was decided in *Buckley* as discussed above.

In any event, the arguments regarding the time politicians spend fundraising were, as conceded by my colleagues, known and made before the Supreme Court in *Buckley*. Because my colleagues quote a commentator for the proposition that in *Buckley*, "'candidate time protection was almost wholly ignored as a justification for campaign spending limits,'" Maj. Op. at 47 (quoting Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1285-86 & n.15 (1994)), I quote the pertinent passages from the briefs and lower court decision in the margin. The time-protection argument was relied upon by the Court of Appeals in *Buckley* in upholding the statute, [24] was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General,[25] was

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[24] *See Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975). The Court of Appeals found that:

> In practice . . . candidates were compelled to allot to fund raising increasing and extreme amounts of time and energy. Senator Hollings testified that survival required candidates for national office to "set down a policy where they won't go see people other than those who can give money." Joseph Cole, finance chairman for the Democratic National Committee, testified from his experience in some four or five Presidential campaigns, how dog-tired candidates must arise early in pursuit of large contributions, and continue "all day long and all night long." "[How] much time do you think a Presidential candidate spends on fund raising? . . . at least 70 percent of his time, and I think all of his waking hours. It is really demeaning, demeaning to go through it."

Id. (footnotes omitted).

[25] *See Landmark Briefs: 2 Buckley v. Valeo* (Brief for the Attorney General as Appellee and for the United States as Amicus Curiae). The relevant section of the brief stated:

argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits,[26]

> Fund raising consumes candidate time that otherwise would be devoted to campaigning.
>
> The court of appeals found support for the statute in the fact that in order to raise large amounts of money to support a campaign, "candidates [are] compelled to allot to fund raising increasing and extreme amounts of time and energy." A past finance chairman of the Democratic National Committee testified that a presidential candidate is required to spend 70 percent of his time in pursuit of funds.
>
> There is, of course, another side to this problem. If the idea is that expenditure limits relieve the pressure of raising funds, thereby giving the candidate more time to engage in speaking, there may be effective alternative means of accomplishing this end. For example, public financing of election campaigns, quite independent of restrictions upon contributions and expenditures, will provide some relief. A restriction on contributions will increase this effect even without an accompanying restriction on expenditures; once candidates are precluded from drawing upon wealthy donors who command personal attention, campaign fund raising may turn more to direct mail efforts that are sparing of the candidate's time.

Id. at 434-35 (internal citations and footnotes omitted).

[26] *See Landmark Briefs: 2 Buckley v. Valeo* (Brief for Appellee Center for Public Financing of Elections, Common Cause, League of Voters, et al.). The brief stated:

> Th[e] rising thirst for money has forced candidates to divert time and energy to fund-raising activities and away from other activities, such as addressing the substantive issues, that do not fill campaign coffers. Joseph Cole, who was National Finance Chairman of the Democratic National Committee, vividly recounted

and was mentioned by the Supreme Court itself.[27] The claim that this issue was not fully before the Court in *Buckley* is therefore incorrect.

> the effects of the pressure to raise money on candidates in a passage quoted by the court of appeals:
>
> > ". . . I have been close to four or five Presidential campaigns . . . . I have sat next to the Presidential candidate, who was tired, who was weary and concerned with the issues and not able to handle them, not able to prepare, not able to think about them because he has to go downstairs at 7 in the morning to shake hands with a guy from whom he may get a large contribution."
> >
> > "It goes on all day long and all night long, and I was asked at the Senate hearings how much time do you think a Presidential candidate spends on fundraising? And I said at least 70 percent of his time, and I think all of his time, and I think all of his waking hours. It is really demeaning, demeaning to go through it."

Id. at 97 (footnotes omitted); *see also* Landmark Briefs: *2 Buckley v. Valeo*, (Brief of Senators Hugh Scott and Edward M. Kennedy as *Amici Curiae*) ("The pressure upon candidates to raise money from large contributors had become so great as to leave them little time for ordinary citizens.") (footnote omitted).

[27] *See Buckley v. Valeo*, 424 U.S. at 91 ("In this case, Congress was legislating for the 'general welfare' . . . to free candidates from the rigors of fundraisers"); id. at 96 ("In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."); S. Rep. 93-689, 5 (cited in above quotations from Buckley, and justifying public financing because "[m]odern campaigns are increasingly expensive and the necessary fundraising is a great drain on the time and energies of the candidates"); see also Buckley, 474 U.S. at 258-59 (White, J., concurring in part and dissenting from the Court's

c) The Insufficiency of the Governmental Interests

Even putting aside *Buckley's* binding precedent, the various interests asserted in defense of expenditure limits fail to satisfy First Amendment requirements.

1) Anti-Corruption

Act 64 drastically reduced the limits on contributions established in prior Vermont law. There is no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence. All of the --largely sparse, anecdotal, and conclusory -- evidence of improper influence dates from a time when the contribution limits were much higher.

Prior Vermont law allowed contributions of $1000 per election to any candidate. *See* Vt. Stat. Ann. tit. 17, § 2805(a) (1996) (amended 1997). As noted, Act 64 limits contributions to candidates for statewide office to $400, for the state senate to $300, and for the state house to $200. *See* Vt. Stat. Ann. tit. 17, § 2805(a). The reduction is greater than might be perceived because Act 64's contribution limits apply over a two-year cycle and related individual and party expenditures -- *e.g.*, mileage, house parties -- must be counted in determining whether a donor has reached the limit. *See id.* § 2801(a), 2805(a), 2805a(a), 2809(a); *see also supra* Part III(b)-(e).

In assessing the anti-corruption effect of expenditure limits, my colleagues rely on a portrait of Vermont politics

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view that the expenditure limits were unconstitutional) ("In another major innovation, aimed at insulating candidates from the time consuming and entangling task of raising huge sums of money, provision was made for public financing of political campaigns for federal office.").

drawn from testimony by a handful of proponents of Act 64. That portrait is essentially as follows. The money spent on campaigns has been spiraling over the forty or more years in which Vermont has toyed with expenditure limits. *See* 1997 Vt. Laws P.A. 64 (H. 28) (finding no. 1); Maj. Op. at 12-14, 49-53. The urge to raise campaign money has increased accordingly, *see id.* at 49-53, leading to an "arms race" caused by the fear of being "vastly outspent," *id.* at 58, in which, because one candidate may, for example, buy materials for yard signs, others must do so also, *see* Trial Tr. vol. IX, at 148 (Elizabeth Ready). We are also told that candidates for legislative office have historically spent less in their campaigns than the limits set by Act 64. *See* Maj. Op. at 63-64. In concrete terms, this means that the average campaign cost, the "arms race," for single-member Vermont House or Senate races has over 40 years spiraled to $2,000 and $4,000 respectively. *See generally* Vt. Stat. Ann. tit. 17, §§ 2805a(a)(4), (a)(5).

We are also told that raising these sums creates such a dependence among legislators on large contributors -- at the time, a $1,000 maximum -- that for the entire two years after each election, the legislators engage in "perpetual fundraising," Maj. Op. at 7, and have little time to talk with ordinary citizens. *See id.* at 49-52. The selections from the testimony highlighted in my colleagues' opinion portray members of the Vermont legislature as susceptible to corruption and so obsessed with soliciting or conferring with cash donors that they have very little time to confer with ordinary citizens. *See* Maj. Op. at 50-54 (describing candidates as being "locked away" while fundraising instead of "out with the public" because "candidate time is effectively for sale").

The record justifying Act 64's massive regulation of political speech is not strong; in fact, it is pitifully weak. Even if Vermont legislative candidates had to raise cash

amounts well in excess of $4,000, this task would hardly leave them so obsessively dependent on large contributions (now a maximum over a two-year cycle of $400, $300, $200, depending on office), *see* Vt. Stat. Ann. tit. 17, § 2805(a), that large contributors would thereafter be able to demand the right to most of the legislators' free time. What little actual evidence there is to the contrary is on its face gross hyperbole. For example, the testimony of a person described by my colleagues as a "lobbyist," who offered descriptions of Governor Dean meeting only with contributors, Trial Tr. vol. IX at 195-96 (Anthony Pollina), is heavily relied upon in their opinion, Maj. Op. at 50, 52, 53. In fact, that person was a lobbyist for the passage of Act 64, whose success in that regard -- with the Governor's support – entirely belies his assertions about elected officials listening only to large contributors.

There are also, of course, the accusations of corruption with precisely the same scripted sound-bites that are used in every talk-show discussion of these issues. In fact, my colleagues' opinion overstates this testimony by omitting important qualifications offered by the witnesses relied upon, such as their lack of knowledge of any legislative vote ever cast solely because of a campaign contribution, Trial Tr. vol. VII at 48-49 (Toby Young); Trial Tr. vol. VII at 105 (Cheryl Rivers) ("I am not talking about selling votes."), their denial of present improper influence in contrast to their fear of future behavior *under the old contribution limits*, Trial Tr. vol. VII at 37 (Toby Young) (opining that Vermont elections are clean); *id.* at 50 (opining that an official would grant preferential access to a *thousand-dollar* donor); Trial Tr. vol. VII at 137-38 (Cheryl Rivers) ("I don't think the present situation is good, and I think if we don't do something, it's going to get worse."); Trial Tr. vol. IX at 167-69 (Elizabeth Ready) (accepting *$1000* and *$2000* contributions appeared improper though she was not influenced), and their knowledge of the ready access of

ordinary citizens to lawmakers, Trial Tr. vol. VII at 27-28 (Toby Young) (stating that typical state public officials in Vermont will see anyone who wants to see them).

The only particularized evidence of improper influence relied upon by my colleagues consists of one anecdote. It involved "widely reported" meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations, Maj. Op. at 50. We are asked to assume in this case that unspecified contributions -- in contrast to, perhaps, numbers of voters involved -- were the decisive factor. Moreover, not only are the details of this episode unknown, but it also took place before Act 64's limits on contributions. It is therefore not particularly relevant.

In any event, the First Amendment does not permit the suppression of speech based on such untested anecdotal evidence. *See,e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 820-21 (2000) (requiring more than "anecdotal evidence" of "signal bleed" problem in support of a regulation requiring broadcasters to fully scramble sexually-oriented programming); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) ("Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

Moreover, if the claims of widespread, improper influence are true, anecdotes should not be the only available evidence. Disclosure of contributions has been required in Vermont for years, offering documentary support for the claims, if accurate, of dependence on large or bundled contributions and of the influence of those contributions. *See*, e.g., Vt. Stat. Ann. tit. 17, §§ 2811(a)(1)-(4) (effective

July 1, 1982) (amended 1997) (requiring campaign reports for candidates' contributions and expenditures). The lack of reference to available hard evidence of who gave what to whom even under the prior higher contribution limits suggests that the portrait of corruption painted by my colleagues is vastly overdrawn.

When the Supreme Court decided *Buckley*, it had before it detailed records of actual large, bundled contributions and the amount of out-of-pocket expenditures by candidates.[28] *See*, *e.g.*, *Buckley*, 424 U.S. at 32-34 & nn. 35-40; Joint Appendix at 264, 483, *Buckley* (Nos. 75-436 and 75-437); *see also supra* note 22. Nevertheless, it struck down the expenditure limits as facially unconstitutional. *See Buckley*, 424 U.S. at 54-55. Here, the opposite result is

[28] For example, the Court of Appeals in *Buckley* stated:

> Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper . . . . On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge.

519 F.2d at 840 n.36.

reached based on anecdotal evidence, even though better evidence, if corruption exists, is available.[29]

[29] My colleagues suggest in a footnote citing to *McConnell*, see Maj. Op. at 42, n.12, that speech may be suppressed based solely on anecdotal evidence, and that reliance on a couple of untested and untestable anecdotes from Act 64's supporters is sufficient. However, *McConnell* -- which dealt with contributions, not expenditures -- does not stand for any such proposition. *McConnell* explained specifically how "[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." 124 S.Ct. at 664 (citing among other sources the declaration of former Senator Alan Simpson that "Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform"). *McConnell* also noted that

> The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. . . . federal officeholders have commonly asked donors to make soft-money donations to national and state committees "solely in order to assist federal campaigns," including the officeholder's own. Parties kept tallies of the amounts of soft money raised by each officeholder, and "the amount of money a Member of Congress raise[d] for the national political committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign." Donors often asked that their contributions be credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft. National party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate. Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute

> lists of potential or actual donors, or donors themselves would report their generosity to officeholders.

Id. at 662-63 (quoting and citing statements by politicians, CEOs and lobbyists).

To support their argument that anecdotal evidence may, by itself, serve to repress speech, my colleagues parse *McConnell*'s statement that "The record in this case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 664, see Maj. Op. at 42 n.12. In fact, this statement does not reference a record "replete" with anecdotal evidence, as my colleagues seem to believe, but introduces a factual discussion: So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors." *Id.* at 665 (noting parenthetically "records indicating that DNC offered meetings with President in return for large donations").

For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials. *Id.* at 662-63 (quoting and citing statements by politicians, CEOs and lobbyists).

To support their argument that anecdotal evidence may, by itself, serve to repress speech, my colleagues parse *McConnell*'s statement that "The record in this case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 664, see Maj. Op. at 42 n.12. In fact, this statement does not reference a record "replete" with

2) Time Protection

I turn now to the claim that expenditure limits are necessary because "endless fundraising[] drastically reduces opportunities that candidates have to meet with non-contributing citizens." Maj. Op. at 50. As noted, this argument was squarely before the Supreme Court in *Buckley*. *See supra* notes 24-27. It was, understandably, given only passing attention by the Court because it is not compelling in any sense. The time protection argument, baldly stated, is

anecdotal evidence, as my colleagues seem to believe, but introduces a factual discussion:

> So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors."

Id. at 665 (noting parenthetically "records indicating that DNC offered meetings with President in return for large donations").

that law can force candidates to engage in more personal communications with voters by limiting candidate spending on other means of communication.

The evidence in the record of excessive time consumption reveals that it is not a testable proposition but can be repeatedly stated as fact and in exaggerated terms. There is no doubt that candidate time is spent fundraising and that some of it is wearisome. However, there is also no doubt that one can say that candidates spend too much time fundraising without knowing how much time is actually spent, because no one else knows either. This particular record contains almost no evidence of the specific time spent fundraising. To the extent that a particular amount of time was described, it was brief, such as an afternoon. Trial Tr. vol. IX at 151 (Elizabeth Ready) ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door.").

Time protection is a useful political argument for a number of additional reasons. It allows legislative proponents of expenditure limits to avoid saying that limits are needed because they themselves might be tempted to vote for or against a measure solely to get a campaign contribution. Instead, they can say, without fear of any future verification, that they need more time to spend with "ordinary citizens."

The time protection argument is also useful because it can easily be exaggerated. There is often no dividing line between donors and "ordinary citizens" who support a candidate or between fundraising and other campaign events. Meetings with supportive voters can often be described either as "fundraising" or as "person-to-person contact with voters," depending on the point to be made. The type of campaign events at which money is raised might well be held even if no contributions were sought. After all, even a

holiday dinner with family members can be described as being "locked away" with large donors. *See* Vt. Stat. Ann . tit. 17, § 2805(f) (contributions by candidates and their immediate families unlimited).

In a more sinister vein, time protection is a particularly useful argument for incumbents. It is on its face either a remarkable example of incumbent self-sacrifice or a remarkable example of self-interest. Should we believe that incumbent legislators, who generally can raise campaign money more easily than non-incumbents, want major-party and third-party challengers to spend less time fundraising so that the challengers can spend more time engaged in supposedly more effective personal meetings with ordinary citizens? Or, is it possible that incumbents may want to stress the value of person-to-person contact over other methods of communication with voters, knowing that those other methods of communication with voters will still be substantially available to incumbents even under expenditure limits while not -- or much less -- available to potential challengers. For incumbents, the time protection argument is less about increasing person-to-person contact with voters than it is about limiting their opponents' overall contact with voters. Time protection and incumbent protection thus usefully coincide. Finally, person-to-person contact between candidates and voters will not increase under an incumbent-rigged system. Potential challengers will be deterred from running, and incumbents who will be protected by the law's expenditure limits will have less need for person-to-person contact.

Governmental interests that are so speculative -- or incumbent protective -- are not sufficient to override significant First Amendment interests. *E.g.*, *Stanley*, 394 U.S. at 567.

In any event, Act 64 actually diverts candidates from

meeting with voters. As my colleagues concede, limiting the size of individual contributions necessarily increases the amount of time that must be spent raising a particular amount of money. Maj. Op. at 52. Moreover, expenditure limits also impose time consuming tasks on candidates themselves, particularly because expenditure limits may preclude the hiring of staff. As noted, expenditure limits require candidates to map-out, monitor, and put values on activities by supporters or party organizations that involve related expenditures, which, if they exceed $50 with regard to a single source, must be totaled within the permissible expenditure and contribution limits. *See* Vt. Stat. Ann. tit. 17, § 2809(a)-(c); *see also supra* Part III(e). Every campaign event involving supporters -- *e.g.*_buying yard signs and driving to where they will be placed, holding meetings or dinners -- must involve close calculations by candidates as to whether the particular activities constitute expenditures or related expenditures and what value should be attributed to particular in-kind expenditures. Act 64's provisions will actually force candidates to spend more time than ever on non-speech-related activities.

3) Public Confidence in Government

This brings me to the argument of Act 64's proponents that the expenditure limits of Act 64 will restore public confidence in government and thereby increase citizen and voter participation in elections. Of course, every attempt to suppress speech is based on claims that the speech in question, if allowed to go on freely, will induce behavior that is undesirable. Critics of literature, theater, or television with explicitly sexual or violent themes claim that such speech may induce the behavior portrayed. *See, e.g.*, 1 American Psychological Association, *Report of the American Psychological Association Commission on Violence and Youth*, at 6 (1992), *available at* http://www.apa.org/pi/pii/violenceandyouth.pdf (stating that exposure to violence in

mass media increases the risk of youth involvement in violence). Those who would censor political speech will always argue that such speech will reduce confidence in government. I have no doubt that supporters of the Alien and Sedition Acts made such arguments and that many incumbent officeholders view vigorous opponents as undermining confidence in government.

Governmental suppression of speech must be based on a compelling demonstration that the speech will incite conduct --here an alleged indifference to politics on the part of citizens -- that government has a right to prevent. *See Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech, requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects.") (internal citations omitted); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). I do not doubt that government can and ought to take steps to enhance citizen confidence, but suppressing political activity will not encourage either more confidence or more political activity.

In fact, no little part of the public confidence argument is a quintessential self-fulfilling prophesy. The confidence of Vermont citizens in their state government is unlikely to be substantially enhanced so long as Act 64's proponents make unsupported claims about the corrupt nature of that government.

In any event, an indifference to politics cannot be traced to excessive spending for electoral purposes. To the

contrary, the New Hampshire 1968 primary and the Vermont 2000 election involved heavy citizen participation because of voter interest in the issues and the critical fact that candidates who were divided on those issues could raise and spend money debating them. The theory of Act 64, as stated in the legislative findings, is that public involvement decreases as spending increases. *See* 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 4 and 10). However, record amounts were spent on the Vermont 2000 gubernatorial election, *see* Ross Sneyd, *Campaign 2000 Involved Lots of Spending*, Associated Press, Dec. 18, 2000, but a full -- perhaps also record breaking -- 34.5% more people voted in the 2000 election than in the prior gubernatorial election. *See 2000 Election Results*, *supra*.

Nor is there experience elsewhere to the contrary. Before 1976, presidential general elections were privately funded with no limits on contributions and expenditures. Claims of a lack of citizen confidence were made. From 1976 through 1988 -- before the era in which so-called soft money played a growing role --presidential general elections were fully funded by government and subject to expenditure limitations. No appreciable increase in turnout or confidence in government was noted.

As in the one-size-fits all concept of an average election, there is much in the public confidence argument to fear. Proponents of Act 64 rely upon evidence such as a poll showing that 75% of voters believe that large corporations have too much influence and on a newspaper article (published by a very large corporation) stating similar conclusions. If polls suggesting that citizens believe that some groups have too much power demonstrate a governmental interest sufficient to silence those groups, political speech, including freedom of the press, cannot be protected.

Act 64 reduces the contribution limits for statewide races to $400, Senate races to $300, and House races $200. *See* Vt. Stat. Ann. tit. 17, § 2805(a). There is nothing in the record of this case to suggest that these limits are not sufficiently low to dispel any possibility of corruption or the appearance of corruption, at least as viewed by reasonable persons. *See Buckley*, 424 U.S. at 55 (holding that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions," and therefore does not justify campaign expenditure limitations). The proponents of Act 64 mention only hypothesized, large, cash contributions as leading to an improper influence on government. There is no evidence whatsoever that expenditures by supporters for "meet the candidate" events, or that supporters' use of a residence, computer or phone, purchase of stamps, or driving to meetings have ever caused a problem that calls for redress.

Moreover, there is nothing in the record to suggest that disclosure of amounts and sources of a candidate's campaign funds, in conjunction with low contribution limits and/or a form of public financing, is not the proper democratic method of enhancing voters' confidence in the character of the people they elect. Nor is there anything in the record to suggest that a reduction of campaign activity, in particular grassroots activity, will lead to persons of better character being elected, particularly under the terms of a law enacted by those of purported lesser character.

The theory of Act 64 is that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups. Because these groups are theoretically able to use every means of communication as a conduit of influence, political activity at every level must be reduced. Act 64 is, therefore, designed to impose relative silence on everyone, with two exceptions. First, incumbents will ensure that they can communicate with the public.

Second, the truly rich and powerful can still engage in constitutionally protected independent political activities or buy a media outlet. Expenditure limits do not limit the influence of a Richard Mellon Scaife, a George Soros, or the politically concerned persons that publish the Washington Post, New York Times, National Review, and New Republic. Candidate expenditure limits in fact enhance the power of these wealthy individuals to set the political agenda while the ordinary citizen -- who must speak, if at all, through organizational activity -- is silenced.

d) Stopping the "Arms Race," "Effective Advocacy," and Incumbent Protection

As noted, the term "arms race" has been much used in this litigation, *see*, *e.g.*, Appellants' Br. at 26-27; Maj. Op. at 42, 44, 49, 51, 58, 59, 68, 72; Trial Tr. vol. VIII at 57 (Peter Smith); Trial Tr. vol. VII at 56 (Cheryl Rivers), but in a way that suggests that it is so obviously an appropriate analogy that an explanation of its relevance is unnecessary. When examined, however, the analogy has no logical or factual support. It is also antithetical to the First Amendment because it suggests that government may set a low maximum limit on political speech and, to boot, one that is particularly harmful to challengers.

1) The "Arms Race"

The "arms race" analogy is a useful -- and therefore oft-used -- political slogan for proponents of Act 64 because it suggests subliminally a catastrophic spectre of millions being killed and perhaps elimination of the species itself. However, the analogy between nuclear-tipped ICBM's -- which many people would want to eliminate completely -- and political advertisements -- in Vermont, yard signs -- is not one that meets the straight-face test, much less one that

fits well within First Amendment jurisprudence, and this aspect of the analogy is unworthy of further discussion.

What other lessons the slogan "arms race" is deemed to further are difficult to detect because it is used as an argument-stopper rather than argument-advancer. It may suggest that much of political spending is superfluous -- beyond a certain point additional spending does not change votes. This is a suggestion that posits candidates who keep spending even though it will not benefit them. If so, the empirical basis for that suggestion is not visible in this record. Nor is there a visible basis for believing that the particular point at which further persuasion stops is the low expenditure limits imposed by Act 64.

Perhaps the implication is that spending becomes superfluous at some point but candidates have no idea where that point is and continue to spend anyway. However, if the critical point cannot be determined by a candidate in a particular campaign, it certainly cannot be determined on a one-size-fits-all basis by a self-interested legislature or by a reviewing court.

My colleagues apparently do not use "arms race" to imply superfluous spending. Rather, they perceive the "race" to result from the fear of being "vastly outspent" by better financed opponents. Maj. Op. at 58. They do not deny that on election night, election officials do not count the dollars spent by a candidate to determine the winner, and thus, that a fear of being outspent necessarily associates spending with voter persuasion. *See id.* at 52 (quoting Act 64 supporter for proposition that contribution limits without expenditure limits would lead to competitions "to see who could raise the most money and outspend their opponent and *therefore* win the race") (emphasis added). "Arms race" is therefore a pejorative method of describing competition over voter persuasion, the very heart of the democratic process.

The proponents of Act 64, like my colleagues, also use the slogan "arms race" to argue that any such race should be prevented because, in their view, (supposedly) low cost, person-to-person contacts are the most effective campaign tactics. Trial Tr. vol. IX at 143, 150 (Elizabeth Ready) (personal contact more effective than paid media); Trial Tr. vol. VII at 100 (Cheryl Rivers) (challenger spending more than incumbent is not serious detriment to incumbent, who "can make it up with grass roots effort"). Therefore, campaign expenditures above a certain level (somehow determined) can be eliminated without disadvantaging any candidate.

What is not explained, however, is why, if spending above that somehow determined level is ineffective, such spending by a candidate is feared by the candidate's opponent. The answer must be, and is, that the additional spending does persuade voters. As the incumbent Senator, whose testimony is relied upon by my colleagues, testified, she had to spend more than she wished because her opponents' ads and yard signs caused voters to wonder whether she was running for reelection. Trial Tr. vol. IX at 148 (Elizabeth Ready) ("[W]hen everybody has yard signs out and everybody's on the radio and the TV, your constituents will say, Aren't you running Elizabeth? I see that so and so has got a million yard signs out. You don't have any yard signs.") Her opponents, in short, had gotten the attention of voters, who appear to have been more oblivious to her person-to-person campaign than she would have liked. In fact, as used in the present record, "arms race" is a term by which incumbents describe contested elections.

2) "Effective Advocacy"

I turn now to the test adopted by my colleagues to determine whether the level of expenditure limits set by Act 64 is unconstitutional. That test asks whether the limit is so

low that it prevents "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice." Maj. Op. at 62-63 (internal citation omitted). Two aspects of this test must be emphasized. First, it is a minimum speech test, expressly authorizing government to silence candidates once they reach "the level of notice" (assuming no less restrictive methods are available). Second, my colleagues, by equating (understated) average past expenditures with the threshold "level of notice, " *id.*, further reduce the minimum at which government can silence candidates, *see supra* Part IV(b)(1).

Despite the unconditional statements by the Supreme Court that contribution limits "'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication,'" *McConnell*, 124 S. Ct. at 655 (quoting *Buckley*, 424 U.S. at 20), while "limitations on expenditures [are] direct restraints on speech," *id.* at 647, my colleagues take the "effective advocacy"/"level of notice" standard from a discussion of contribution limits in *Shrink*, 528 U.S. at 395-96, and force it into the quite different context of expenditure limits.

Contributions pose the spectre of improper influence and may be substantially limited. *Colorado II*, 533 U.S. at 440-41 ("limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of political spending are"). The language taken by my colleagues from *Shrink* says no more than that, even given the governmental interest in reducing improper influence, contribution limits may not be set so low as to prevent an otherwise viable candidate with large numbers of potential small donors from raising enough money even to be noticed by voters. 528 U.S. at 395-96. It does not say that such a candidate may, having raised a substantial amount in small contributions, be prevented from spending more than what (government believes) is needed to reach the minimum level of notice. Indeed, *Shrink* itself repeatedly and conspicuously

emphasized the constitutional distinction between contribution limits and expenditure limits. 528 U.S. at 386 ("expenditure limits [are] direct restraints on speech, which nonetheless suffer[] little direct effect from contribution limits"); *id.* at 387 (noting a "similar difference between expenditure and contribution limitations in their impacts on the association right"); *id.* ("restrictions on contributions require less compelling justification than restrictions on independent spending") (internal citation omitted). This distinction was recently reaffirmed by the Court in *McConnell*, 124 S. Ct. at 655 (reaffirming practice of "subject[ing] restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions" because "contribution limits, unlike limits on expenditures, entail only a marginal restriction on the contributor's ability to engage in free communication").

Unlike expenditure limits, which directly restrain speech, *Buckley* made clear that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." 424 U.S. at 21. "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication . . . [because] the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

It is from this premise -- as long as the candidate can speak effectively, the contributor also can speak -- that the effective advocacy test was born. *See also McConnell*, 124 S. Ct. at 655-56 ("Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to prevent candidates and political committees

from amassing the resources necessary for effective advocacy.") (internal quotation marks and alteration omitted). In no way do the cases evaluating contribution limits use the effective advocacy test to restrain the direct political speech occasioned by expenditures.

Were these cases read otherwise, they would represent a complete abandonment of the First Amendment's standard of a free, robust discussion in which citizens "retain control over the quantity and range of debate on public issues in a political campaign," even when those who control the government believe the spending to be "wasteful, excessive, or unwise." *Buckley*, 42 4 U.S. at 57. That test, which emphasizes freedom, would be replaced by a test that permits government to cap the amount of permissible speech.

3) Incumbent Protection

The rhetoric of the "effective advocacy"/"level of notice "standard based on average past expenditures conceals a legal test lethal to challengers. A "level of notice" is something that incumbents generally have and challengers generally lack. Under my colleagues' test, therefore, an incumbent's campaign starts at the "level of notice" at which a challenger's campaign may be stopped by government. This anti-challenger effect is aggravated by the use of average past expenditures to determine the "level of notice." *See* Maj. Op. at 62-63. As detailed above, *see supra* Part IV(b)(1), past averages, even if accurately calculated -- a result not attainable given Act 64's new definitions -- include uncontested, or barely contested, elections. *See* Trial Exs. vol. III at E-0967 (appellees' expert's calculation of average expenditures, which includes low-spending candidates whose spending is unknown by assuming they spent $500, the maximum allowed before filing is required); *id.* at E-1019 (appellees' expert's report criticizing appellants' expert for failing to include low-spending candidates, whose

spending is unknown, in his averages of campaign expenditures).

e) The Excessive Discretion Accorded Administrators

In their first opinion, my colleagues, noting that "[i]t is beyond cavil that an opponent of the Act will argue its ambiguities and statutory peculiarities," addressed the merits of that argument and stated that the discretion accorded administrators by Act 64 was not constitutionally excessive . *Landell v. Sorrell*, slip op. at 9156 (withdrawn). They now argue that the issue need not be addressed. Maj. Op. at 75, n.26. I disagree.

The discretion issue is clearly before us. The degree to which Act 64 limits political activity is the first part of the calculus that is before the court. The second part of the calculus is the sufficiency of the reasons proffered in its support. Where only acts of administrative or judicial discretion can mitigate the harshness of restrictions on protected activity so as to render the justifications for the restrictions constitutionally sufficient, the constitutionality of that discretion itself is obviously put in issue.

Mild or incidental restrictions on political activity require less compelling justifications than do harsh restrictions. *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003)(level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association") (internal citation omitted). Much of what Act 64 says harshly limits political activity; much else is left to future elaboration. Perhaps we may rely upon the wisdom of Vermont's Secretaries of State, Attorneys General, and its courts, to mitigate the harsh effects of Act 64's language and to resolve its pervasive ambiguities in favor of freedom,

rather than suppression, of political speech. If so, the reasons offered in support of the Act might seem sufficient. However, mitigating rules -- *e.g.* reducing the effect on the press or allowing local party affiliates self-financing -- would involve wholly discretionary or arbitrary decisions, and the very existence of that discretion is itself a constitutional problem that cannot be avoided.

Limits on campaign expenditures are like all limits on speech. If the limits are triggered, further speech is forbidden. It is standard First Amendment jurisprudence that such a restriction on speech must be precisely crafted to avoid vesting those who administer the law with excessive discretion as to its interpretation. *See Forsyth*, 505 U.S. at 131 (requiring "narrow, objective, and definite standards"). The requirement that a law regulating speech embody workable and known standards is necessary both to alert those who are regulated to its terms, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) (requiring regulation of speech to give "fair notice" to those to whom it is directed), and to prevent enforcers from making decisions based on impermissible grounds, *see id.* at 1050-51 ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."); *Forsyth*, 505 U.S. at 131 (noting "danger of censorship" where regulation allows excessive enforcement discretion).

Act 64 simply lacks discernible criteria for the many interpretive and valuation questions that it creates. If there is to be compliance with Act 64 -- instead of candidates and their supporters generally ignoring it as a silly law -- there must be constant interpretation by the Secretary of State, the Attorney General, and the Vermont courts with regard to the vast number of questions that will arise election-by-election, campaign-by-campaign, and day-by-day. The answers to those questions are the equivalent of granting or denying a

permit to speak. In interpreting the statute, however, the Secretary of State and the Vermont courts are afforded almost no guidance except for the manipulable proposition that the influence of "special interests" is to be reduced and that of "ordinary citizens" increased.

For example, the statute says nothing about the payment of debts or wind-down expenses of prior campaigns during the next two-year cycle. *See 1999 Memorandum, supra*. It is also unclear whether the (paltry) exception for expenses for "meet the candidate" events applies only to party-sponsored events or all such affairs. *See supra* notes 14-15; *see generally* Vt. Stat. Ann. tit. 17, §§ 2809(d) (1) - (3).

If Act 64 is enforced, valuation questions regarding the donation or use "of anything of value" will themselves be a constant issue. When the Act was passed, the Secretary of State set the cost at 31¢. Although travel on behalf of a candidate's campaign is a related expenditure counting toward the contribution limit, *see* Vt. Stat. Ann. tit. 17, § 2809(c), she has arbitrarily not changed that figure notwithstanding the substantially increased price of gas and the pervasive availability of public and private mileage guidelines. In fact, employees of the State of Vermont are compensated at 37½¢ per mile at present. Vermont Dept. of Personnel, *Collective Bargaining Agreements*, at http://www.vermontpersonnel.org/employee/labor_cba.cfm (effective July 1, 2003 to June 30, 2005) (setting mileage reimbursement for Vermont employees at level established by the U.S. General Services Administration, currently 37½¢). Given the two-year cycle and the low contribution/related expenditure limits, mileage valuations are of enormous importance, but those valuations appear essentially to be matters of caprice under Act 64.

There will also be ubiquitous questions concerning whether particular activities of officeholders, "candidates,"

or would-be "candidates" have "the purpose of influencing an election." *See generally* Vt. Stat. Ann. tit. 17, § 2801. Indeed, the Supreme Court stated in *Buckley* that the last-quoted phrase was unconstitutionally vague unless more narrowly confined than it is in Act 64. *See supra* note 6. There is also little guidance as to what conduct is an "affirmative action to become a candidate," *see supra* notes 9-10, or what professional services are donations or related expenditures by a firm rather than volunteer services. *See id.* §§ 2801(1), 2809.

Furthermore, the definition of "related expenditures" can provoke thousands of questions regarding actions of individuals or political parties as to which the answer turns -- after a potentially intrusive inquiry into the fine details of what candidates and political parties want to do or did, what they said, and what they thought -- on what was the "primary thrust" of the activity. *See Appendix A.* In addressing such questions, the Secretary herself has noted that the likelihood of so many different factual circumstances arising prevents the drafting of precise rules regarding whether particular efforts by a party will be related expenditures on behalf of candidates -- one of the most important questions arising under Act 64. *See id.*

All of these issues are serious, bristling with First Amendment implications, and their resolution will ofttimes award an election to one candidate rather than another. If a party's poll is deemed a related expenditure on behalf of a candidate for the House, most or all of that candidate's expenditure limits for two elections may be exhausted. If a particular activity by an incumbent legislator is deemed an expenditure, rather than the performance of an official duty, that legislator may be barred from driving the family automobile to the local town green to make a speech during the campaign. If the activity is not an expenditure, the incumbent legislator may be allowed to engage freely in very

helpful electoral activities that are denied to his or her opponent. If a candidate has a supporter who is a lawyer and whose professional services are not deemed related expenditures, that candidate will have a great advantage over another whose supporters are not lawyers, including the ability to bring litigation against the opponent that will exhaust the opponent's campaign funds. A ruling allowing lawyers to contribute professional services without counting such services as contributions or related expenditures is hardly out of the question under Act 64, even though lawyers are not less apt than other citizens to seek favors from elected officials for themselves or their clients.

The Secretary of State's opinions allowing partners to make double donations -- once by the partnership, once by the individual partners -- and endorsing the legality of "pass-the-hat" fundraisers in which donors are allowed to remain anonymous and on the honor system as to how much they give are only the first examples of how Act 64 will come to mean what the Secretary of State and Vermont courts say it means. *See 2001 Guide*, *supra*. Mileage is now computed at 31¢ no matter what the price of gas. *See 2001 Memorandum*, *supra*. Such uncabined discretion cannot be squared with the First Amendment's requirements that speech be regulated according to spelled out and precise criteria.

Equally important, such discretion cannot be squared with increasing confidence in government, which, in enforcing Act 64 against those running for government office, will necessarily appear inefficient and arbitrary. Only an organ of government can administer and interpret these laws. However, that interpretation consumes time when time is of the essence[30] --*Appendix A* is a letter dated December 3,

[30] In the last mayoral election in New York City, a candidate claimed to be eligible for public financing in a primary race, but his application was denied in a debatable ruling. *See* Mirta Ojito, *Badillo Campaign Denied*

1999, responding to an inquiry dated October 8 -- and is susceptible to colorable claims of partisan influence.

In Vermont, the purported author of Act 64 was denied public financing because his party took a poll that, if attributed to his candidacy, would be a related expenditure causing him to exceed the maximum contribution and expenditure limits for candidates eligible for public financing. *See* Ross Sneyd, *Progressives' Poll Raises Question About Public Financing*, Associated Press, Feb. 21, 2002 (describing Anthony Pollina's violation of the campaign finance law). The Democratic party then objected to his receipt of public financing. *See* Ross Sneyd, *Democrats Ask that Pollina Be Disqualified from Public Financing*, Associated Press, Feb. 28, 2002. The Secretary of State and the Attorney General, both Democrats, undertook an investigation into the activities of the candidate's party. *See* Ross Sneyd, *Progressives Sue to Ensure Public Financing for Pollina*, Associated Press, Mar. 12, 2002; *see also* Ross Sneyd, *Pollina's Lawyer Says He Won't Cooperate with AG's Probe*, Associated Press, Mar. 22, 2002. The candidate was then quoted as saying, quite understandably, "You have the Democratic Party asking the Democratic Attorney General based on an opinion of a Democratic secretary of state to investigate a Progressive Party candidate." Christopher Graff, *Anthony Pollina's Campaign Demeans Legislators*, Associated Press, Mar. 17, 2002. A system in which partisan politicians investigate and make rulings on how vigorous a campaign their opponents

Matching Funds, N.Y. Times, Sept. 8, 2001, at B6; Mirta Ojito, *Badillo Appeals Ruling on Campaign Fund Match*, N.Y. Times, July 25, 2001, at B4. A Campaign Finance Board later overturned that ruling but only after the primary election was over. *See A Bit Late for Race, Badillo Gets Funds*, N.Y. Times, Apr. 12, 2002, at B3.

may wage is not a confidence-builder.

VI. THE REMAND ON NARROW TAILORING

My concerns over the remand to the district court for various "findings" are fourfold. First, my colleagues' opinion draws no distinction between legislative facts, mixed questions of legislative fact and law, adjudicative facts, and issues of law -- on this record distinctions of crucial importance to any further proceedings in the district court and in this court. Second, it is unclear what parts of Act 64 my colleagues deem to be restrictive, and to what degree, thereby hampering if not precluding any comparison with alternatives. Third, vastly less restrictive alternatives with no constitutional implications are so obvious that a remand is unnecessary. Fourth, on many issues, the forum that needs to be heard from is not the district court but the Vermont legislature.

a) Legislative Facts, Adjudicative Facts, and Mixed Issues of Fact and Law

One of the difficulties I had with my colleagues' earlier opinion -- but did not elaborate in my earlier dissent -- was that it did not make clear which facts are of a legislative nature -- facts that determine the appropriateness of a rule of law -- and which facts are of an adjudicative nature – facts that affect the legal relations of the particular parties to a particular lawsuit. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules (explaining the "fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.");

see also Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) ("Adjudicative facts" are "facts about the parties and their activities, businesses, and properties, as distinguished from general facts which help the tribunal decide questions of law and policy and discretion.") (Friendly, C.J.) (internal quotation marks and citation omitted). Nor did my colleagues' earlier opinion separate factual matters from mixed issues of legislative fact and law. The remand for "fact finding" has now pushed these issues to the forefront.

1) The Distinction Between Legislative and Adjudicative Facts

I recognize that the distinction between legislative and adjudicative facts is no bright line and is often judicially finessed. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 403 (1942) ("courts have generally treated legislative facts differently from adjudicative facts, even though the distinction has not been clearly articulated"). In the present case, however, the perceived need for a remand appears to be based on the conviction that adjudicative facts need to be resolved. In my view, that is not so.

Legislative facts are factual assumptions or conclusions that cause a court to choose one rule of law rather than another or to hold that certain circumstances meet a particular legal test. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules. Legislative facts thus govern all future cases implicating the particular rule of law or its application and are not subject to future challenge by a litigant save by an attempt to have the rule of law overruled. My colleagues' repeated reliance on the existence of an "arms race," their adoption of the "level of notice"/"effective advocacy" test defined by average past expenditures, and their conclusion that Act 64's expenditure limits meet that

test, all rest on factual assumptions about candidate spending. These assumptions are quintessential legislative facts.

Determination of legislative facts is not governed by the Federal Rules of Evidence. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules. Nor are they subject to clearly erroneous review under Fed. R. Civ. P. 52. *See In re Asbestos Litigation*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (citing *Lockhart v. McCree*, 476 U.S. 162 (1986)). Instead, they are subject to *de novo* review, and appellate courts not only can find legislative facts on their own but they also usually do so. *See* Davis, *supra*, at 403-07 (describing Supreme Court and other cases in which appellate courts found legislative facts). The practice is so common that what technically might be called mixed issues of legislative fact and law are often treated simply as issues of law. Whether expenditure limits set at the level of average past spending are sufficient for "effective advocacy," for example, is just such an issue.

Adjudicative facts determine the legal relations of particular parties with regard to particular issues of controversy. Adjudicative facts do not govern the results of future litigation -- save for the application of doctrines of preclusion such as res judicata and collateral estoppel. Determination of these facts is governed by the Federal Rules of Evidence and may be based on credibility determinations. Significantly, adjudicative facts are subject to clearly erroneous review on appeal under Rule 52. Fed. R. Civ. P. 52(a). Examples of adjudicative facts are whether one party struck another by driving an auto through a red light.

2) Remand for "Findings" of Legislative Fact and of Law

In my view, my colleagues fail to observe the

adjudicative/legislative distinction because they view legislative facts relating to the constitutionality of Act 64 as the sole province of the district court, while an appellate court may address only the legal issues arising from these facts. As their opinion expressly states, "[A]lthough we do not question the validity of the factual findings developed by the legislature in support of Act 64, our system of judicial review provides plaintiffs the opportunity to present competing evidence, assigns to the District Court the responsibility for making findings of fact and conclusions of law after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess the legal significance of these factual findings." Maj. Op. at 35 (footnote omitted). As a result, the remand in the present case seeks findings on legislative facts, mixed issues of legislative fact and law, and even pure questions of law.

My colleagues remand for findings on whether higher limits would achieve the anti-corruption and anti-time consumption goals and "impinge less on the First Amendment rights of candidates and voters." *Id.* at 73-75. This inquiry is described by them as a "fact intensive question of whether that point is set in Act 64 or appreciably higher" and apparently is viewed as an adjudicative fact as to which the district court may make credibility determinations that are binding on this court unless clearly erroneous. *See id.* at 74; Fed. R. Civ. P. 52 (a). However, the issues are clearly ones of mixed legislative fact and law that can and should be decided by this court.

It is undisputed that: (i) the view that Act 64's limits will not substantially affect candidate spending is arrived at only by averaging in spending in essentially non-contested elections and using a definition of spending much narrower -- one that excludes all related expenditures by individuals and political parties -- than that used by the Act; and (ii) even under the narrow definition, the limits are far below

spending in actual contested elections in Vermont, including spending by third party candidates. All that is left is the legal question of the sufficiency of the governmental interest in justifying the restrictions on speech.

My colleagues also remand for what they describe as "fact-finding on [the] issues" of

> (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.

Maj. Op. at 74 (footnote omitted). None of these issues involves adjudicative facts. Issues (3) and (4) are clearly questions of mixed legislative fact and law, if not solely of law, while issues (1) and (2) involve determinations of legislative history.

For yet another example, footnote 24 of my colleagues' opinion indicates that "findings" are to be made on remand as to a pure matter of law: whether required reports of spending by candidates for past elections included "related expenditures" as defined in Act 64, *i.e.* including spending by individuals and political parties. *Id.* at 72-73 n.23. This is an issue of Vermont law over which there is no dispute. Prior Vermont law never mentioned "related expenditures"; the term was first introduced and defined in Act 64; before that there were contribution limits on individuals, and political parties could give and spend freely;

there are, therefore, no "facts" to find.

In the same footnote my colleagues also ask for findings with regard to whether "legal and record-keeping costs of compliance with [Act 64] will also inflate future candidates' expenditures." *Id.* My colleagues appear to concede that such costs are expenditures and are therefore limited by Act 64. What more need be known? There are no adjudicative facts at issue here. The Secretary of State has advised candidates to obtain legal advice, and any legal or record keeping costs will drastically affect, say, a House candidate who must wage both a primary and general election contest with a total two-year expenditure limit of $2,000. The trees in Vermont may be beautiful, but needed professional services do not grow on them.

My colleagues now concede that this court will apply *de novo* review to legislative facts found by the district court. *Id.* at 73 n.24. However, my colleagues make no attempt to inform the parties and the district court of what findings are to be of legislative fact and what are to be of adjudicative fact. For example, my colleagues' remand for "fact-finding" on the types and amounts of limits rejected by the Vermont legislature and the reasons for rejection. *Id.* at 74. I see no comparative advantage in the district court's researching this question of legislative history unless it is contemplated -- and I assume it is not -- that the district court will take testimony on the state of mind of the then-legislators, resolve credibility issues, and find facts on these issues.

My colleagues do agree that a distinction between legislative and adjudicative facts exists and that legislative facts are reviewed *de novo* while adjudicative facts are reviewed under the "clearly erroneous" standard. However, they never identify which of the many "findings" to be made on remand are legislative and which are adjudicative, and, therefore, what rules to apply to each. This failure will

greatly complicate further proceedings.

In my view, virtually all the issues remanded are ones of legislative fact or of law, and, therefore, there is no reason for a remand. Moreover, if my colleagues believe that further findings of legislative fact are needed, they can request briefing of the relevant issues by the parties, rather than returning questions of law to the district court only to have us later resolve them *de novo*.

b) Failure to Define What is Restrictive About Act 64

Clarification is also needed with regard to the inquiry on remand as to whether there are less restrictive alternatives available. As I said at the outset of this dissent, my colleagues still fail to analyze much of what Act 64 actually says and does, and, as a result, their opinion contains few descriptions of significant political speech that they deem to be restrained by Act 64. An inquiry into less restrictive alternatives requires some identification and discussion of those restrictions for which an alternative might be substituted. That is to say, an available legal rule may be deemed less restrictive only after its restrictions are compared with the restrictions of an existing legal rule. *Colorado II*, 533 U.S. at 464-65 (comparing restrictiveness of existing limitation on coordinated expenditures with available legal rule limiting contributions alone). However, my colleagues' opinion neither acknowledges nor denies that Act 64: intrudes on grassroots activities of ordinary citizens, restricts the press' editorializing or reporting on political events, disadvantages candidates who must run in two elections rather than one, and so on and so on.

The *lacunae* in my colleagues' opinion are nowhere better exemplified than by the remand with regard to related expenditures. Maj. Op. at 76. The two sentences directing

this remand precede a discussion upholding Act 64's treatment of related expenditures as contributions. That discussion notes that limits on related expenditures are designed to avoid evasions of the limits on contributions. *Id.* at 90-96. For example, if someone can both lend office space to a candidate and make a cash contribution at the maximum limit, that person can evade the limits.

Before this discussion, their opinion states "On remand, independent of the constitutionality of expenditure limits, the district court should evaluate [the constitutionality of treating related expenditures as candidate expenditures]." *Id.* at 76. Of course, one reason the related expenditure provision was included in Act 64 was that cash or in-kind expenditures by individuals coordinated with a campaign are an obvious method of evading candidate expenditure limits as well as contribution limits. To return to the prior example, if a person lends office space to a candidate, the cost must be treated as an expenditure subject to the limits on campaign expenditures, or those limits can be evaded. Because Act 64 reflects the view that expenditure limits cannot be effective without treating individual and party related expenditures as expenditures by the candidates, it is enigmatic, to say the least, to ask the district court to evaluate "this issue . . . independent of the constitutionality of expenditure limits." My colleagues appear to be troubled by Act 64's limits on related expenditures but fail to describe or discuss the reasons for their disquiet. Such a description or discussion would surely be helpful to the district court and the parties.

c) The Existence of a Less Restrictive Alternative

I turn now to the question of whether, if Act 64 contains the restrictions described in this dissent, there are less restrictive alternatives. My colleagues frame this issue as an inquiry into what alternatives were actually considered by the Vermont legislature. *See* Maj. Op. at 74. That is not the

proper inquiry.[31] A state may not impose laws suppressing political speech and then successfully defend them on the ground that it was ignorant of alternatives. Rather, the issue is the existence of less restrictive alternatives, not whether a particular legislature considered them. *See Boos v. Barry*, 485 U.S. 312, 329 (1988); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 2 80 n.6 (noting that the term "narrowly tailored" "require[s] consideration of whether lawful alternative and less restrictive means could have been used").

Moreover, when properly framed, the answer to the inquiry is so self-evident in the present case that a remand is unnecessary: a combination of public and private financing with low contribution limits is infinitely less restrictive -- is actually speech supportive -- and accomplishes all of the ostensible purposes of Act 64's expenditure limits. Public financing of campaigns is of unquestioned validity, *see*

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[31] In a footnote responding to this dissent, my colleagues concede that "[o]f course, the ultimate issue for the District Court on remand is whether there exists a less restrictive type or degree of regulation that would serve Vermont's compelling anti-corruption and time-protection interests; it is not merely whether the legislature *considered* such an alternative." Maj. Op. at 74-75 n.25 (emphasis in original). Unfortunately, the text of their opinion continues to direct the district court on remand to consider only what was "considered" by the legislature. *See id.* at 74 ("On remand, the District Court ought consider, . . . (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.") Were I to eliminate my criticism of their text, their footnote would become superfluous and similarly removed, leaving the text of their opinion stating the incorrect standard.

Buckley, 424 U.S. at 57, n.65, 85-109, and, combined with low limits on private contributions, can guarantee a critical mass of funds to all candidates, thereby freeing candidates of improper influence from particular donors and relieving candidates of the need for extensive fundraising. Such a combination of public and private financing with low contribution limits would impose only a modest burden on taxpayers, who, we are told, are anxious to eliminate undue influence by donors.

My colleagues suggest in a footnote, *see* Maj. Op. at 75 n.25, that the conclusion that a combination of public and private financing would satisfy the goals of Act 64 is neither self-evident nor supported by the record. To the contrary, if any conclusion is established, it is this one. As my colleagues' opinion repeatedly states, low contribution limits further the anti-corruption goal. And, as the Vermont legislature has stated, public financing (provided in gubernatorial races) furthers both the anti-corruption and time protection goals. 1997 Vt. Laws P.A. 64 (H.28) (findings nos. 11 and 12). Public funding money does not come from private sources, is quickly obtained, and lessens the need for private money because it is as negotiable.

The problem with this speech-supportive alternative is not its dubious merit but the fact that incumbent legislators know that a combination of public and private financing would vastly increase the number and viability of challengers. The dark secret of campaign finance reform is that its proponents avoid this alternative in a Faustian bargain with incumbent legislators who reject it out of self-interest. Incumbents prefer speech-limiting expenditure limits, a preference that will gain in intensity if federal courts will allow such limits to be based on past average spending and to be upheld so long as they do not drive challenger campaigns below "the level of notice."

d) Remanding to the Wrong Forum

As I have argued above, even if expenditure limits were not *per se* illegal, the limits set by Act 64 are so ridiculously low that they fail under any reasonable standard. In fact, they are so low that they would diminish spending by third party candidates, not generally regarded as generators of "arms races," and would limit even modest grassroots activities by supporters. Similarly, the restrictions on spending by local party affiliates fail because no reason has been offered to justify them. Holding the expenditure limits and the restrictions on the financial organization of political parties unconstitutional would send these issues back for reconsideration to the proper forum -- the Vermont legislature.

My colleagues show great deference to the Vermont legislature and to the various legislative proponents of Act 64 whose views are in the record. This deference is entirely undeserved. There is not the slightest evidence that either the legislature or those proponents ever examined the details of the Act or how they impact those ordinary political activities that are indispensable to democratic rule. Consequently, the legislators never weighed Act 64's costs in suppressed activity. There is no evidence of any discussion of, *inter alia*, the effects on grassroots activity, the two-year cycle, the effect on the press, the costs of legal services to candidates, or the radical restructuring of political parties.

In fact, their own testimony suggesting that "meet and greet events" such as "spaghetti suppers," "little parties" for "150 people" to which "a couple hundred people" are invited by mail, booths at county fairs, barbecues, and op-ed articles in the press are campaigning methods not involving Act 64's expenditure limits, *see supra* Part II(b), itself reflects an awesome ignorance of Act 64's provisions. Moreover, it is certainly hard to find any explanation other

than ignorance of the contents of Act 64 for the fact that the executive director of the Vermont Democratic party challenged, as harmful to grassroots activities, the ruling by the Secretary of State that Act 64's limits on contributions to parties treat all party affiliates as a single unit, *see Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999, even though the ruling simply followed the plain language of the Act.

The lobbyist who secured passage of Act 64, who has been described as its author, and who is quoted at great length in my colleagues' opinion, has since brought an action in the district court to have the treatment of related expenditures declared unconstitutional as infringing on the (his) right to engage in political activities. *See Vermont Reformer Says Law He Authored Is Unconstitutional*, Political Finance, The Newsletter, March, 2002 (describing Anthony Pollina's lawsuit to have Act 64 ruled unconstitutional); Ross Sneyd, *Progressives Sue To Ensure Public Financing for Pollina*, Associated Press, March 12, 2002 (noting that Anthony Pollina calls his lawsuit "ironic"); *see also* Complaint at 1, *Pollina v. Markowitz*, No. 2:02-CV-63 (D. Vt. Mar. 11, 2002) ("Plaintiffs claim that certain provisions of Act 64 violate their First Amendment free speech and association rights, do not serve compelling state interests, and violate equal protection and due process of law, both facially and as applied.")

Officeholders have filed disclosure forms that indicate a continuing lack of knowledge of the requirements of Act 64, in particular the need to record and disclose mileage and the value of office space and outside professional services. *See, e.g., Campaign Finance Report of William Doyle*, Dec. 16, 2002 (listing no mileage expenses for himself or any supporters, or any value derived from use of office space, computers, utilities, etc., or any outside legal or accounting services); *Campaign Finance Report of*

William Doyle, Sept. 25, 2002 (same); *Campaign Finance Report of William Doyle*, Oct. 25, 2000 (same); *Campaign Finance Report of Anthony Pollina*, Dec. 16, 2002 (listing no mileage expenses for any supporters or any value derived from use of office space, computers, utilities, etc., or any outside legal or accounting services); *Campaign Finance Report of Jeb Spaulding*, Dec. 15, 2002 (same); *Campaign Finance Report of Deborah Markowitz*, Dec. 16, 2002 (listing no expenses for value of office space, computers, utilities, basic office supplies, etc., or any outside legal or accounting services); *Amended Campaign Finance Report of Deborah Markowitz*, Oct. 29, 2002 (same); *Campaign Finance Report of Deborah Markowitz*, Dec. 18, 2000 (same). The actual spending by other proponents of Act 64 also belies their opinions as to the reasonableness of Act 64's limits. *See supra*, Part IV(b)(1)(C) (describing Act 64 proponents who exceeded its limits in past elections).[32]

Deference to a legislative judgment is due when some minimal effort has been made by legislators to weigh the relevant factors and strike a minimally informed balance. There is no evidence of any such legislative effort with regard to Act 64's actual effect on political activity.

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[32] Even where proponents do report spending for mileage, the numbers are rounded-off and therefore appear to be estimates. *See, e.g., Campaign Finance Report of Anthony Pollina*, Sept. 25, 2002 (reporting in kind contribution of mileage by self of $2720); *see also Campaign Finance Reports of Deborah Markowitz*, Sept. 25, Oct. 25, and Dec. 16, 2002 (reporting in kind contributions of "postage, travel, phone") by Paul Markowitz of $525, $460, and $120, respectively). These round numbers are not divisible by 31¢ -- the per mile cost of gas assigned by the Vermont Secretary of State; *see 2001 Memorandum, supra*.

Even under my colleagues' legal theory, therefore, the Act's limits on expenditures must be struck down as well below any reasonable constitutional standard, and the limits on local party affiliates must be invalidated for the lack of any proffered justification. Such a ruling would leave the Vermont legislature in a position to deliberate on the full ramifications of its actions in considering new legislation but still free to pursue it. *See Quill v. Vacco*, 80 F.3d 716, 742 (2d Cir. 1 996) (Calabresi, J., concurring) ("no court need or ought to make ultimate and immensely difficult constitutional decisions unless it knows that the state's elected representatives and executives -- having been made to go, as it were, before the people --assert through their actions (not their inactions) that they really want and are prepared to defend laws that are constitutionally suspect"), *rev'd*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 466 n.1 (2d Cir. 1995) (Calabresi, J., concurring) ("when factual developments have made a law's prior justification constitutionally invalid, it is up to the legislature to decide whether to advance another state interest in support of that law") (citing *Abele v. Markle*, 342 F. Supp. 800, 810-11 n.18 (D. Conn. 1972) (Newman, J., concurring), *vacated*, 410 U.S. 951 (1973)); *Tunick v. Safir*, 209 F.3d 67, 74 (2d Cir. 2000) (implying that state suicide statute could have been interpreted not to ban assisted suicide because "the New York Court of Appeals had never clarified, and the legislative history cast some doubt upon, the question of whether the New York ban on assisted suicide, first enacted in 1828, was ever meant to apply to a treating physician") (internal quotation marks omitted).

VII. CONCLUSION

In holding, with only one dissenting vote, that limits on candidate expenditures are unconstitutional, *Buckley* simply followed the mainstream First Amendment jurisprudence that is applied to communicative activity of far

less constitutional significance than political speech. *See, e.g.*, *Stanley*, 394 U.S. at 567 (disallowing speculative governmental interest in banning obscene material as justification for statute restricting nonpolitical speech); *Smith v. California*, 361 U.S. 147, 151 (1959) (applying "stricter standards" in statutory scrutiny where statute has "a potentially inhibiting effect on speech"). That jurisprudence calls for scrutiny that does not take unquestioningly and at face value the claims of a law's proponents without actually examining the law. *See Buckley*, 424 U.S. at 40-41 (stating that "[b]efore examining the interests advanced" in support of legislation, "[c]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests"); *id.* at 41 ("The test is whether the language of [the statute] affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). That jurisprudence demands that a law restricting speech, including editorializing speech by the press, spell out what it permits and what it prohibits in intelligible detail, *see Forsyth*, 505 U.S. at 131, and not leave vast areas of discretion to those who must implement it. *See Thomas*, 534 U.S. at 323. That jurisprudence denies to government "the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," *Buckley*, 424 U.S. at 57, and "to control . . . the quantity and range of debate on public issues in a political campaign," *id.* Under that jurisprudence, Act 64's limits on expenditures and party financing cannot be upheld. Under that jurisprudence, forcing a reorganization of political parties that reduces the autonomy of local party committees for no articulated reason is unconstitutional.

If one looks at what Act 64 says instead of what its proponents say about it, it is quite apparent that the Act does indeed embody the theory of the defense witness who opined

that government may regulate political speech the way it regulates electric companies, *see supra* Part III(a). Although Act 64 is said to be aimed at reducing the corrupt influence of "special interests" while enhancing the role of "ordinary citizens," it substantially disables ordinary citizens from meaningful participation in the political process. It cripples party organizations, particularly at the local level, and prevents individual grassroots activities on behalf of candidates, while organized economic interests retain the ability to engage in costly independent political advocacy. Moreover, the Act distinctly benefits the "special interest" that enacted it: incumbents.

In the beginning of this dissent, I quoted Justices Brandeis and Black on the dangers of high-minded assaults on liberty. In waging its broad attack on political activity in pursuit of its goal of transferring political power from "special interests" to "ordinary citizens," Act 64 also exemplifies the wisdom of another, albeit less August, source, Walt Kelly: "We have met the enemy, and he is us."

APPENDIX A

State of Vermont
Office of the Secretary of State
Representative Terry Bouricius
56 Booth Street
Burlington, VT 05401

December 3, 1999

Re: Your e-mail of October 8, 1999

Dear Representative Bouricius,

Please accept my apology for the delay in responding to your questions. The review of my proposed opinion took longer than anticipated. This letter is in response to the two questions which you raised in your e-mail. I will restate the questions to make sure we understand the fact patterns which I am addressing.

1. Can a political party which has no "candidates" as defined in 17 V.S.A. §2801(1) at the time the proposed poll is conducted, pay in excess of $500 for the conducting of a professional poll to seek potential voters opinions about selected potential candidates, both Progressive and otherwise, and share the poll results with potential candidates without the polling expense and associated political party activities triggering either a person named in the poll becoming a "candidate" as defined in §2801(1), nor disqualifying a person named in the poll from seeking public financing from the Vermont Campaign Fund, if a person named in the poll later decided to become a candidate?

The conducting of a poll by a political party to "test the waters" for various potential candidates will not trigger a "candidacy" for a person named in the poll even if more than $500 per potential candidate is expended by the party for the

poll so long as only the general results are used for recruiting, media releases, or other generalized activities. The conducting of the poll itself falls within the types of activities generally pursued by a political party for its overall organization, planning, and strategy. The political party can conduct a poll and can make the general results or the poll public without triggering any candidacies. The party can use the results of the poll in a general way for recruiting candidates. (For example, telling John Jones that he was the favorite in a potential race with 3 other names, would be general information which can be used for recruiting.) However, as I will discuss below, *the acceptance of detailed data and information from the poll by an individual will trigger a candidacy if the cost of the poll which is attributable on a pro rata basis to the provision of specific information and data to a particular candidate exceeds $500.*

The Vermont campaign finance law does not specifically address polling activities and expenses. The definition of "candidate" in 17 V.S.A. §2801(1) states that "an affirmative action" of "(A) accepting contributions or making expenditures of over $500" will trigger a candidacy. The definition of contribution includes "a gift of money or anything of value." It is when an individual accepts the detailed data and information gained from the professional poll, that "a gift of anything of value" is accepted, and if the specific information given to an individual cost over $500 to produce on a pro rata basis, then a candidacy will be triggered.

Because it is the acceptance of the gift of detailed data from the poll, not the polling itself, which can trigger a "candidacy," the political party could conduct a professional poll at any time but wait until after February 15, 2000 to offer any detailed data or information from the poll to an individual in order to avoid the prohibitions of the Vermont

campaign fund (public financing). The law states that if a person becomes a candidate before February 15 of the general election year, that person shall not be eligible for Vermont campaign finance grants, 17 V.S.A. §2853(a). Therefore, if before February 15th, a person accepts detailed data from a professional poll which is a gift of "anything of value" which cost over $500 to produce on a pro rata basis, the person has become a candidate by accepting a contribution totaling $500 or more, and will not be eligible for the Vermont campaign finance grants.

In summary, the political party can conduct polls and make the general results of the poll public without triggering any candidacies. If specific data and information is accepted by an individual which cost over $500 to produce on a pro rata basis, a candidacy is triggered. If the candidacy is triggered before February 15, 2000, the candidate will not be eligible for campaign finance grants. A political party and any individual considering accepting the detailed results of a poll should consult their own attorney to discuss specific fact patterns and how the law would be applied to those specific facts.

2. Can a political party spend in excess of $500 to arrange and sponsor dinners, other events, or party mailings for the purpose of educating party supporters or potential contributors about Vermont campaign finance grants and the need for "qualifying contributions"? Can the party make other preparations to assist a future candidate in gathering "qualifiers" for use after February 15, 2000?

Your question leaves room for many fact patterns so we will address three possible scenarios for such preparations, including dinners, events or mailings which we do not believe will trigger a candidacy and then discuss some additional considerations that might raise issues in the mind of an opposing candidate who could raise the issue using the

process in 17 V.S.A.§2809(e).

A. If the proposed events are for the sole purpose of educating voters about the need for many small contributors in order to qualify for Vermont campaign finance grants, to explain the importance of party organization, or to discuss any other topics related to general campaigning, the expenditures clearly would not trigger a candidacy.

B. If the party conducts mailings in which individuals are named or discussed as potential candidates because the party is hoping to generate interest in candidacies, but the individuals do not have knowledge of the fact that their names are mentioned, and the primary thrust of the activities are party organization and education of voters about the requirements of the campaign finance grant law, then the mailings would not trigger a candidacy.

C. If the party conducts other activities to develop a database of persons who might be willing to contribute "qualifying contributions" or solicits conditional pledges if an individual decided to run (see Secretary of State Letter of July 6, 1999), these activities would not trigger a candidacy.

D. However, if the party conducts dinners, events or mailings or solicits pledges in which potential candidates are introduced and discussed, and the potential candidates have participated in the planning of the events or given approval to them, the potential candidates will need to evaluate when or whether they might cross the line into candidacy by either accepting contributions or making expenditures of $500 or more by way of "accountability of related expenditures" as described in 17 V.S.A. §2809. We cannot anticipate every possible fact pattern that may develop as the party and potential candidates proceed, so we

merely want to raise the prospect that at some point the activities may raise questions in another candidate ' s mind and the opposing candidate may use §2809(e) to seek findings and a determination from a court. Each party and potential candidate should review proposed activities with their own counsel to examine the particular facts to evaluate whether they may fall into the category of activities addressed in 17 V.S.A. §2809 as "related expenditures" and possibly trigger a candidacy based upon accountability for a related expenditure of $500 or more.

This letter represents my opinion on the issues which you have raised. You may seek your own counsel to advise you in these matters. Assistant Attorney General Michael McShane has reviewed this advisory opinion on behalf of the Office of the Attorney General and that office concurs with this opinion. If you have any questions please contact me at 828-2304 or kdewolfe@sec.state.vt.us.

Sincerely,

Kathleen S. DeWolfe

Director of Elections
and Campaign Finance

cc: Michael McShane, AAG Distribution List

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of February, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

--v.--

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W.

FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

A poll on in banc rehearing was conducted among the active judges of the court, a majority of whom voted to deny rehearing in banc. Judges of the court expect to file opinions in due course.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Lucille Carr

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of April, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

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WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W.

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VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

ORDER

Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing in banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case in banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc was **DENIED** by order of the court filed February 11, 2005.

The court hereby **AMENDS** that order to further reflect that, upon consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was **DENIED.** Judge Winter dissents from the denial of rehearing.

The court also **AMENDS** the February 11, 2005, order to reflect (1) the opinions concurring in the court's denial of rehearing en banc filed by Judges Straub and Pooler and Judges Sack and Katzmann, and (2) the opinions dissenting from the court's denial of rehearing in banc filed by Chief Judge Walker, Judge Jacobs, and Judge Cabranes.

Judges Straub, Pooler, Sack, Sotomayor, Katzmann, and B.D. Parker concur in the denial of rehearing en banc. Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley dissent from the denial of rehearing in banc. With this order, Judges Straub and Pooler are filing a concurrent opinion; Judges Sack and Katzmann are filing a concurring opinion, in which Judges Sotomayor and B.D. Parker join; Chief Judge Walker is filing a dissenting opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join.

Other judges of the court have indicated that they expect to file opinions concurring in the denial of in banc rehearing in due course. Further dissenting opinions may also be forthcoming. If further opinions or amended opinions are filed, this order will be amended as necessary to reflect those opinions.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Richard Alcantara, Deputy Clerk

STRAUB and POOLER, Circuit Judges, concurring in the denial of rehearing *en banc*:

We concur in the Court's decision to deny rehearing *en banc*.

Sack and Katzmann, Circuit Judges, with whom Sotomayor and B.D. Parker, Circuit Judges, join, concurring in the decision to deny rehearing en banc:

We agree with the decision of the Court not to rehear the decision of the panel en banc. We think it appropriate, in light of the opinions that are being filed dissenting from this view, to add a few words.

The issue for us, of course, is not whether the opinion for the panel majority or the dissent was right. Judge Winter's opinion dissenting from the panel opinion, *see Landell v. Sorrell*, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., dissenting), is indeed thorough and forceful. Assuming that it is as sound as the dissenters say that it is, however, as Judge Feinberg reminded us in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam), "[m]ere substantive disagreement with a panel decision is not, under FRAP 35, [[1]] sufficient reason for an in banc rehearing. If we do not follow the clear spirit of the Rule, we will become mired in endless internal review," *id.* at 941 (citing Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 369 (1989); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The*

[1] "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 25(a).

Virtues of Restraint, 50 Brook. L. Rev. 365, 382 (1984)); *see also* James L. Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L. Rev. 387, 392-93 (1995). The issue for us, then, is whether to grant a rehearing en banc because "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2).

Whether the question here is "of exceptional importance" is, for us, a close call. The issue of campaign finance and its relationship to First Amendment protection for political expression is obviously important, at least as a general matter. It is less clear to us, though, that the decision in the case that we are being asked to review is, at this stage, itself "exceptionally" important.

This case has been remanded to the United States District Court for the District of Vermont for further proceedings. Vermont and Vermonters may, in the course of or in connection with the proceedings in the district court, resolve these issues themselves. As for the impact of the decision elsewhere, if any, we simply do not know. We could only join the dissenters in speculation.[2] But if the Supreme Court does not grant certiorari in *Landell* or otherwise resolve the questions raised, and the panel opinion *does* lead other legislative bodies in this Circuit to enact campaign finance laws that share the characteristics of the Vermont law that Judge Winter thought constitutionally flawed, the doors to this Court will be open to a challenge. The resolution of such a challenge may ultimately indeed require en banc review. We may at that time need to reconsider the merits of the panel's decision en banc.

[2] Chief Judge Walker speculates, *ante* at 5-6, that the panel opinion "*could* lead other legislative bodies in Vermont, and in other states within and without this circuit, to enact campaign-finance laws that trammel free-speech rights," and Judge Jacobs asserts, *ante* at 28, that "[t]he green light has been given to New York and Connecticut (signatories to the States' amicus brief in support of the Act), the hundred counties, and the thousand municipalities under our jurisdiction, to consider and adopt similar limitations on campaign expenditures."

We think that some disputes, because of their highly partisan and political caste, should be addressed by the federal judiciary only when and insofar as is necessary. And we think that this is such a dispute. The resolution of this sort of campaign financing issue is bound to have, or at least to be seen to have, an impact favoring one political side or another depending on the result. We would prefer not to enter into a process that would likely result in a decision of our full Court that would therefore be vulnerable to accusations that it is driven by result rather than by legal analysis.[3] We should avoid it if we can do so responsibly.

We very much doubt, moreover, that were we to rehear this case en banc our work would add substantively to the Supreme Court's deliberations. Were the Supreme Court to decide to grant certiorari in this case, it would have before it the panel majority and dissenting opinions sharply defining the issues as well as the dissenting and concurring views as to whether this Court should undertake to rehear the panel decision en banc. If the dissenters are correct that the panel majority opinion fails to pass constitutional muster, a rehearing en banc of the panel decision would only forestall resolution of issues destined appropriately for Supreme Court consideration.

When it becomes, to use Chief Judge Walker's phrase, our "constitutional responsibilit[y]" to rehear this issue en banc – as it was the constitutional responsibility of the panel to hear it in the first place – of course we should do

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[3] As noted, we think it unnecessary to take issue with the substantive views of our colleagues dissenting from the denial of an en banc hearing. We do note, nonetheless, the remarkable proposition asserted in part V of Judge Jacobs' dissent, *ante* at 30-32 (apparently one of the things, as he puts it, that he "cannot resist saying," *id.* at 21): that at the heart of the panel majority's problems are "constitutional-law professors" and "news organs" subverted by a hidden agenda of some sort, *ante* at 30-31. Suffice it to say that we doubt it. But it is this sort of suspicion of hidden agendas when addressing things political that helps animate our view that en banc rehearing is unwise at this time.

so. Until then, we think the Court has rightly decided to respect what Judge Newman referred to as the "Virtues of Restraint." *See* Jon O. Newman, *Foreward: In Banc Practice in the Second Circuit: The Virtues of Restraint, supra.*

JOHN M. WALKER, JR., Chief Judge, with whom DENNIS JACOBS, JOSE A. CABRANES, and RICHARD C. WESLEY, Circuit Judges, concur, dissenting from the denial of rehearing in banc:

Among the many questionable features of Vermont's campaign- finance statute, the limits placed on campaign expenditures plainly violate Supreme Court precedent and the First Amendment. After a panel majority, over a well-reasoned dissent by Judge Winter, held that those limits were supported by a compelling interest, the full court should have reheard this case in banc. I dissent.

I. Background

In 1997, the Vermont Legislature enacted Act 64, a comprehensive campaign-finance statute scheduled to take effect on November 4, 1998. *See* Vt. Stat. Ann. tit. 17, §§ 2801-2883. In May 1999, a voter, a prospective candidate, and a political-action committee brought suit in federal court in Vermont alleging that the statute infringed their First Amendment rights. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 463, 475-76 (D. Vt. 2000) (*Landell I*). The district court consolidated that suit with two other subsequent actions and permitted various other interested groups to intervene. *Id.* at 463. After a ten-day bench trial in May and June of 2000, the district court upheld most of Act 64's challenged provisions but struck down its limitations on (1) how much money political parties could contribute to candidates, (2) how much

money candidates could accept from out-of-state contributors, and (3) how much money candidates could spend on their campaigns. *Id.* at 468, 493.

Four years later, in 2004 (after having withdrawn an opinion issued in 2002), a divided panel of this court upheld in part and reversed in part the district court's decision. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (*Landell II*). The panel unanimously upheld the district court's determination that the Vermont statute's limitation on out-of-state contributions was unconstitutional. *Id.* at 146; *id.* at 152 (Winter, J., dissenting) (concurring in this holding). The panel also unanimously reversed the district court's decision that contributions to candidates by political parties could not constitutionally be limited. *Id.* at 143 (so holding, but remanding for further findings on, among other issues, how Act 64 affects relations between national parties and state and local affiliates); *id.* at 152, 184-85 (Winter, J., dissenting) (concurring in this holding though challenging statutory provisions that treat party affiliates as one unit for some purposes). The panel was divided, however, over the constitutionality of the Vermont statute's limitations on candidates' campaign expenditures. Judge Winter, in dissent, would have upheld the district court's determination that campaign-expenditure limits are unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *Landell II*, 382 F.3d at 153-56, 185-89 (Winter, J., dissenting). But the panel majority decided that the expenditure limits were supported by two government interests – preventing corruption and preserving candidates' time – that, taken together, were sufficiently compelling that the expenditure limits might be constitutional if the statute were sufficiently narrowly tailored to advance those two interests. *Id.* at 124-25. The majority therefore vacated the district court's holding as to the expenditure limits and remanded the case for further proceedings to determine whether the limits were sufficiently narrowly tailored to survive strict scrutiny. *Id.* at 135-36.

Judge Winter, in an impassioned, insightful, and carefully reasoned dissenting opinion, analyzed the Vermont statute in detail and identified a series of constitutional infirmities that the panel majority failed to consider sufficiently. *Id.* at 149-210 (Winter, J., dissenting). While I agree with virtually all of Judge Winter's analysis of the Vermont statute's many flaws, the panel majority erred most obviously, and most importantly, in not striking down the Vermont law's campaign-expenditure limits as violating the First Amendment's free-speech guarantee.

By leaving open the possibility that meager, incumbent-protective spending limits might pass constitutional muster, the majority has done a huge disservice to Vermont voters and has established a dangerous precedent that could lead other legislative bodies in Vermont, and in other states within and without this circuit, to enact campaign-finance laws that trammel free-speech rights and ensure incumbent protection.

Supreme Court precedent – principally the landmark holding in *Buckley v. Valeo* – leaves no doubt that the constitutional protection of political speech is essential to the very framework on which our political system is built. That precedent also plainly forbids campaign-expenditure limits like Vermont's. The in banc court should have reheard this exceptionally important case, found categorically that the Vermont law's expenditure limits violate the First Amendment, and wiped out the panel's holding that not only accepted a justification for Vermont's expenditure limits that the Supreme Court has rejected, but also glossed over the fact that the limits are so low that they unconstitutionally entrench incumbents. Instead, regrettably, the law of the circuit now conflicts both with Supreme Court case law and with decisions from the Tenth and Sixth Circuits holding similar campaign-expenditure limits unconstitutional. *See Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

II. Discussion

A. Supreme Court precedent compels reversal

In the nearly thirty years since *Buckley*, the Supreme Court has not retreated from *Buckley*'s holding that laws limiting campaign expenditures are subject to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." 424 U.S. at 44-45. Although contribution limits merit "less rigorous scrutiny," *McConnell v. FEC*, 540 U.S. 93, 141 (2003), expenditure limits must survive strict scrutiny – i.e., they must be "narrowly tailored to serve a compelling state interest." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990). First Amendment protections extend to campaign expenditures because "[c]ertainly, the use of funds to support a political candidate is 'speech'...." *Id.* As *Buckley* explained:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19 (footnote omitted).

The Court has identified only one distinct compelling state interest that can support campaign-finance restrictions: preventing corruption and the appearance of corruption. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are *the only* legitimate and compelling government interests

thus far identified for restricting campaign finances.") (emphasis added). The Court has relied on that interest, with a limited exception not relevant here, to uphold only contribution limits, *not* expenditure limits.[4] *See McConnell*, 540 U.S. at 154, 161 (rejecting constitutional challenge to § 323(a) of the Federal Election Campaign Act, which "regulates *contributions*, not activities"); *FEC v. Beaumont*, 538 U.S. 146, 151-52 (2003) (rejecting constitutional challenge to federal ban on campaign contributions by corporations); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381-85 (2000) (*Shrink Missouri*) (rejecting constitutional challenge to Missouri statute limiting campaign contributions); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 184-85 (1981) (rejecting constitutional challenge to federal statute limiting contributions to multicandidate political committees); *Buckley*, 424 U.S. at 23-36, 38 (rejecting constitutional challenge to federal statute limiting campaign contributions). The Court has also upheld restrictions designed to prevent the circumvention of contribution limits, but because those limits were themselves justified by an anticorruption rationale, anti-circumvention is not an independent state interest. *See, e.g.*, *McConnell*, 540 U.S. at 161 (noting that § 323(b) of the Federal Election Campaign Act, which the Court upheld, "is designed to foreclose wholesale evasion of § 323(a)'s anticorruption measures").

Further, in sweeping language *Buckley* rejected the state interest in limiting the overall cost of campaigns as a justification for campaign-finance restrictions:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our

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[4] The Court has upheld limits only on campaign expenditures by corporations out of the corporate treasury. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

> Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

424 U.S. at 57.

Along with limiting the potential justifications for campaign-finance restrictions and establishing that expenditure limits are subject to no less than strict scrutiny, *Buckley*, properly read, established a per se ban on limiting candidates' campaign spending out of personal funds. To be sure, reasonable jurists disagree about whether *Buckley* should be read to have declared *all* campaign-expenditure limits per se unconstitutional. *Compare Landell II*, 382 F.3d at 152 (Winter, J., dissenting) ("[*Buckley*] held, without qualification, that government may not limit campaign expenditures by candidates for electoral office."), *with Homans*, 366 F.3d at 915 (Tymkovich, J., concurring) ("I agree that the *Buckley* Court did not adopt a per se rule against campaign spending limits."). Perhaps it is most accurate to say that *Buckley's* ban on expenditure limits is as close as possible to being a per se ban without the Court having used those exact words.

In any event, *Buckley's* language about limiting what candidates can spend on their campaigns from their own personal resources is surely unequivocal. After explaining that governmental interests in preventing corruption and equalizing candidates' relative financial resources could not justify restricting what candidates for federal office could spend out of their own pockets on their campaigns (a restriction found in § 608(a) of the Federal Election Campaign Act of 1971), *Buckley* concluded: "[M]ore fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a

candidate's personal expenditures is unconstitutional." 424 U.S. at 54.

In light of *Buckley's* exceptionally strong language about First Amendment protection for campaign expenditures – speech that goes to the heart of our constitutional democracy – it is not surprising that the Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups...." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado Republican II*).

When viewed in light of this Supreme Court case law that reflects a deep suspicion of – indeed, hostility to – legislative attempts to restrict political speech by limiting campaign spending, Vermont's campaign-expenditure limits fare no better than the limits struck down in *Buckley*.

B. No compelling interest supports Vermont's expenditure limits

The *Landell II* majority purported to apply strict scrutiny to the Vermont statute's expenditure limits and concluded that, taken together, the state's announced interests in (1) preventing corruption and the appearance thereof and (2) reducing the amount of time devoted by candidates to fundraising were sufficiently compelling to justify those limits. *Landell II*, 382 F.3d at 124-25. The majority went on to find that it lacked enough information to decide whether the limits were sufficiently narrowly tailored to survive strict scrutiny and ordered that the case be remanded to the district court for consideration of whether less-restrictive alternatives could have fulfilled the same goals. *Id.* at 133-36.

Putting aside spending limits on a candidate's use of his or her own funds (which, as noted above, *Buckley* flatly prohibits, but which the Vermont law imposes and the *Landell II* majority did not strike down), *Buckley* required, at minimum, that the *Landell II* panel find that Vermont's

candidate-expenditure limits as a whole could not survive strict scrutiny for want of a compelling state interest. Here there was no compelling interest that could withstand strict scrutiny, and the panel therefore never had to reach narrow tailoring. The remand order was both unnecessary and unjustified.

First, *Buckley* makes plain that although the interest in reducing corruption or the appearance thereof may justify *contribution* limits, this interest cannot justify *expenditure* limits. As the Court noted in relation to the expenditure limits found in § 608(c) in the Federal Election Campaign Act of 1971, "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." 424 U.S. at 55. This language forecloses courts from relying on the corruption-prevention rationale to support expenditure limits. Indeed, courts have regularly applied *Buckley* to strike down expenditure limits that were ostensibly justified by the need to prevent corruption. *See Homans*, 366 F.3d at 917 (Tymkovich, J., concurring, writing for panel) (observing that "candidate spending limits cannot be justified by the anti-corruption rationale"); *Kruse*, 142 F.3d at 915 (same); *see also Colorado Republican II*, 533 U.S. at 441. The Supreme Court has determined that the less-restrictive alternative of contribution limitations and disclosure requirements (both of which are found in Vermont's legislative scheme) suffice to prevent corruption, and it is not for us to gainsay this determination. The majority in *Landell II* paid lip service to this aspect of *Buckley*, *see* 382 F.3d at 119, but by relying on the anticorruption rationale in conjunction with the time-preservation rationale to justify expenditure limits, the majority ignored *Buckley's* holding that preventing corruption cannot justify expenditure limits.

Further, under the strict scrutiny that *Buckley* requires, the time-preservation rationale also cannot support expenditure limits. Indeed, the majority in *Landell II*

implicitly acknowledges the time-preservation rationale's weakness by joining it to the anticorruption rationale as a means of ginning up a sufficiently compelling interest. *Landell II*, 382 F.3d at 125 ("Vermont has established two interests that, *taken together,* are sufficiently compelling to support its expenditure limits....") (emphasis added).

First, *Buckley* expressly rejected cost containment (of which candidate time preservation is a function) as a justification for expenditure limits. 424 U.S. at 57. The *Landell II* majority, seizing on the fact that *Buckley* "alluded to this time-protection interest only in passing," 382 F.3d at 120, argues both that the Court did not consider it and that it (together with the discredited anticorruption interest) is a compelling justification for expenditure limitations. Both arguments fail. The time-preservation rationale was indeed argued to the Court under the rubric of cost containment, and it gains no strength from the fact that the Court rejected it summarily rather than at length. As Judge Tymkovich explained in *Homans*, "the *Buckley* Court did consider the exact argument made here, that the 'thirst for money has forced candidates to divert time and energy to fund-raising and away from other activities, such as addressing the substantive issues.'" 366 F.3d at 918 (Tymkovich, J., concurring, writing for panel) (quoting *Buckley*, Br. of Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States at 72-73); *see also Landell II*, 382 F.3d at 188-89 (Winter, J., dissenting). The Sixth Circuit in *Kruse* also rejected the time-preservation rationale, noting that under *Buckley*, "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts [*sic*] an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." 142 F.3d at 916-17.

Moreover, in the nearly thirty years since *Buckley*, no court of appeals has found that saving a candidate's time from fundraising is a sufficient interest to justify stifling

political speech. Candidate time preservation cannot be a compelling interest because, while the government may have a generalized interest in reducing impediments to an officeholder' s performance of her job, the government has *no legitimate interest* in keeping incumbents in office at the expense of challengers. Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, "The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier." It has an interest in the former, but certainly not the latter. The decision to fundraise is the candidate's and, unless incumbent protection is a legitimate interest, not the business of the legislature. Judge Tymkovich suggests as much in *Homans* when he notes,

> [O]fficeholders are not "forced" to spend any time making calls or otherwise seeking funds. That they choose to do so (allegedly at the expense of their other duties) seems to be a rather weak reason to override core First Amendment concerns. Freeing politicians from having to make that choice is not a compelling governmental interest.

366 F.3d at 919 (Tymkovich, J., concurring, writing for panel) (footnote omitted). Weighed against *Buckley*'s broad protection of political speech, concerns about fundraising time pale in significance.

Finally, by holding that preserving candidates' time is a compelling justification for Vermont's expenditure limits, the *Landell II* majority has given its blessing to circular, self-justifying legislation. The Vermont statute forbids candidates to accept individual contributions from nonfamily members exceeding $200 (if running for state representative or local office), $300 (if running for state senator or countywide office), or $400 (if running for statewide office). Vt. Stat. Ann. tit. 17, § 2805(a). Though laughably low, the panel

majority unanimously found these contribution limits to be constitutional. Setting aside my serious doubts on that score, such low limits require candidates to spend more time fundraising than would higher limits. In other words, the Vermont law's contribution limits increase demands on candidates' time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified. The *Landell II* majority recognized that "without spending limits, the contribution limits would exacerbate the time problem," 382 F.3d at 123, but was untroubled by the self-evident circularity of the time-preservation rationale. Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself up out of a swamp by his own hair. *See, e.g.*, The Adventures of Baron Munchausen (Columbia Pictures 1989).

C. The Vermont law's expenditure limits are so low that they give incumbents an unfair electoral advantage

If the majority in *Landell II* gives too little deference to *Buckley*'s guiding force, it gives too much deference to the Vermont legislature. Even Justice Breyer, who would prefer to give legislators more leeway in regulating campaign finance than governing Supreme Court doctrine provides them, cautioned against deferring to legislators if that deference "risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring).

Vermont's expenditure limits (and, in my view, its contribution limits) are set so low and in such a fashion that only a desire to protect incumbents can explain them. At a time when the costs of political campaigns are routinely counted in the millions, what are Vermont's expenditure limits? To persuade voters of the merit of their candidacies,

those who seek the office of state representative can only spend $2000 (in single-member districts) to $3000 (in two-member districts); state senate candidates are limited to $4000 (in single-member districts) plus $2,500 per additional seat in the district (in multi-member districts); candidates for governor and lieutenant governor are capped at $300,000 and $100,000, respectively; and candidates for other statewide offices can only spend $45,000. Vt. Stat. Ann. tit. 17, § 2805a. The *Landell II* majority held that these limits were not unconstitutionally low because they approximated average spending in past elections. 382 F.3d at 128-31. As Judge Winter points out, however, these limits are drastically below realistic spending levels for competitive races. First, average spending across all elections understates the cost of competitive elections because it includes elections "that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." *Landell II*, 382 F.3d at 173 (Winter, J., dissenting). Second, reported spending numbers for elections held before Act 64's passage include only spending by candidates, not related spending by their supporters. *Id.* at 172-73 (Winter, J., dissenting). Because Act 64 defines candidate expenditures to capture related expenditures by supporters, *see* Vt. Stat. Ann. tit. 17, § 2809, just to keep spending under the new law at historical levels would require setting expenditure limits *above* those historical levels. Finally, Act 64 includes within the expenditure limits "substantial costs of compliance with its terms that were not encountered under the prior law." *Landell II*, 382 F.3d at 173 (Winter, J., dissenting). For example, fees of attorneys – who are a virtual necessity under this reticulated statute – are included as campaign expenditures. Such compliance costs will further eat into limits that, because they are based on past average spending, are already so low that they unconstitutionally magnify the advantage of incumbents.

Only one aspect of Vermont's campaign-finance legislation seems to point away from incumbent protection as

a motivation (and the panel majority seizes upon it, *see id.* at 128): incumbents can spend only 85 to 90 percent of what challengers can spend, depending on the office. Vt. Stat. Ann. tit. 17, § 2805a(c). This small gesture is greatly outweighed, however, by other features of the legislation and the natural advantages of incumbency. Most significantly, the spending caps cover a two-year election cycle and do not set separate caps for primary and general elections. *Id.* § 2805a(a). As Judge Winter aptly notes, this provision "will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle." *Landell II*, 382 F.3d at 180 (Winter, J., dissenting). By contrast, the expenditure limits struck down in *Buckley* at least had the virtue of providing separate limits for primary and general elections. *See* 424 U.S. at 54-55. Further, the Vermont expenditure limits are so low that they "significantly increase[] the reputation-related [and] media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring).

III. Conclusion

This case began in the district court almost six years ago; it was argued before a panel of this court almost four years ago. Instead of cleanly resolving, on the basis of *Buckley*, that Vermont's campaign-expenditure limitations are unconstitutional, the panel majority has now sent the case back to the district court for yet more proceedings. I well appreciate and support the Second Circuit's traditional reluctance to hear cases in banc. *See* Jon O. Newman, *The Second Circuit Review 1982-83 Term — Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365 (1984). By refusing to hear this important case in banc, however, the court has failed to live

up to its constitutional responsibilities. I respectfully dissent.

DENNIS JACOBS, Circuit Judge, joined by JOHN M. WALKER, JR., Chief Judge, and JOSE A. CABRANES and RICHARD C. WESLEY, Circuit Judges, dissenting from the denial of rehearing *in banc:*

I dissent from the denial of rehearing *in banc.*

I cannot add to the number or force of the arguments set out in Judge Winter's dissent from the majority opinion. *Landell v Sorrell*, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., concurring in part and dissenting in part) [hereinafter *Landell Dissent*]. Compelling as Judge Winter's dissent is qua dissent, it transcends the genre. It is scintillating; it marshals the facts and authorities in a way that is learned and witty, often at the same time; it is a crackling good read by any standard of law or letters.

I will therefore confine myself to (i) reasons why *in banc* review is warranted now rather than after the remand, and (ii) things I cannot resist saying.

I

It cannot be seriously disputed that the issues presented are of exceptional significance. Vermont's Act 64 rations the political speech of all candidates seeking any state office in one of the three states within our jurisdiction, and it applies all the time, in back-to-back two-year cycles. *See* 1997 Vermont Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883).

To justify this sweeping limit on political speech, the Vermont Legislature invokes two interests: (a) fighting corruption (and the appearance thereof) and (b) conserving the time of public officials. The majority opinion accepts these interests as the genuine purposes of the Act and holds that, taken together, they are a compelling justification that satisfies strict scrutiny; it remands only for the district court to decide whether the Act's expenditure

limits are narrowly tailored. *Landell*, 382 F.3d at 124-25, 135-37. This remand for narrow tailoring presumes – erroneously – that the Legislature's professed interests are compelling. I conclude they are not compelling, and that we may not take on trust that the interests professed by the incumbents who enacted the Act are their interests in fact – especially since the dominant but impermissible effect of the Act is to protect incumbents.

A. The Legislature's Asserted Interests Are Not Compelling

Buckley unambiguously rejected the anti-corruption rationale for limiting (candidate and independent) expenditures in political campaigns. *See Buckley v. Valeo*, 424 U.S. 1, 45-47, 53,55-58 (1976) (*per curiam*).[5] The interest in saving the time of elected officials is demolished by Judge Winter in his dissent, 382 F.3d at 192-94. Ironically, Vermont officials could reduce the amount of their time spent fundraising simply by raising or eliminating the contribution caps they previously enacted (and further reduce by the Act), which obviously require contacts with more donors in order to raise a given amount of money. *See Landell*, 382 F.3d at 123-24. Thus the *more-restrictive* expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the *less-restrictive* contribution limits. *See id.* at 123-24, 127-28. It is as though a town were to justify a ban on adult establishments by citing the noxious concentration of them caused by a prior ordinance designating a single block as the sole zone for such enterprises. Strict scrutiny does not tolerate such bootstrapping. Thus in *Buckley*, the Court warned that

[5] Over the intervening three decades, the Supreme Court has deviated from this holding just once and narrowly, to deal with concerns raised by the "unique state-conferred corporate structure." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).

because expenditure limits directly restrict political speech, FECA's independent expenditure limits could not "be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." 424 U.S. at 44.

The panel opinion contends that the combination of these two insufficient interests is enough, a sort of synergy of nothing with nothing. Strict scrutiny is not so yielding, especially here: "'[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 42 4 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). A remand for narrow tailoring cannot remedy the root defect that the Act's prohibition on speech serves no compelling state interest (just as tailoring was not the problem with the Emperor's New Clothes).

B. The Act Entrenches Incumbents

By remanding for narrow tailoring, the majority opinion implicitly assumes that the interests cited by the Vermont Legislature are genuine (as well as sufficient), and that the sole effect of the Act will be to advance those interests. But when a law restricts speech in a way that tends to insulate office-holders from challenge, it is neither reasonable nor prudent to treat legislative motive as an issue of fact. *See Landell*, 382 F.3d at 112-14 ("[W]e do not question the validity of the factual findings developed by the legislature in support of Act 64[.]"). Protecting speech requires that courts be skeptical and assume the worst – not as a matter of fact, but as a matter of prudence and policy.

Here, it is easy to demonstrate that the salient effect of the Act is to entrench incumbents--an effect that is fatal under the First Amendment. *Buckley* characterized as "more serious" the argument that contribution and expenditure limits, taken together, "invidiously discriminate against

major-party challengers and minor-party candidates." 424 U.S. at 31 n.33. The Court warned that though "the Act, on its face, appears to be evenhanded[, t]he appearance of fairness. . . may not reflect political reality." *Id.* Given the powerful built-in advantages of incumbency, "the overall effect of the contribution and expenditure limitations [in FECA] could foreclose any fair opportunity of a successful challenge." *Id.*

Strict scrutiny therefore requires that we consider the Vermont Act, and specifically the Legislature's proffered interests, with a cold eye. That is what the Supreme Court did in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The Government cited budgetary and prudential reasons for legislation curtailing funds for legal service organizations that challenged existing welfare law. *Velazquez* disregarded those reasons because the effect of the legislation was unconstitutionally to "insulate the Government's interpretation of the Constitution from judicial challenge." *Id.* at 547-49. Here, the undeniable effect of the Act is to insulate incumbents from effective electoral challenge--a much more direct and effective way to insulate the government from criticism and ouster.

It is beyond dispute that campaign-expenditure caps magnify the already formidable advantages of incumbency. Among those advantages are name recognition and news coverage; free staff use and constituent services; official letterheads and web sites; franking privileges; the celebrity and glamour that attends office-holders when they visit diners, schools, nursing homes, churches, hospitals, clubs, bus-stops and barbershops; etc., etc. *See Landell Dissent*, 382 F.3d at 178-81. The Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest--which of course is more frequently a hurdle for challengers than for incumbents. *See id.* at 160-61, 180.

The panel majority urges that the Act's expenditure limits "are not so radical in effect as to drive the sound of a candidate's voice below the level of notice." *Landell*, 382

F.3d at 128-31 (quotation omitted). But as Judge Winter points out, under a "level of notice" standard, an incumbent, who by virtue of her position already enjoys prominence in the community, starts her campaign "at the 'level of notice' at which a challenger's campaign may be stopped by government." *Landell Dissent*, 382 F.3d at 199.

It would take a childlike credulity to think that these advantages to incumbency have gone unnoticed by Vermont's elected officials.[6] That is why I am unimpressed by the argument that the Act was adopted by an overwhelming bipartisan majority. *See Landell*, 382 F.3d at 100. If one is an incumbent office-holder in Vermont, what's not to like?

II

The panel majority upholds without remand provisions of the Act that enforce the caps on fundraising and contributions by treating local, county, state, regional, and national affiliates of a political party as a single unit. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805. These provisions will stifle local politics by weakening (or killing) county, municipal, and village party organizations across the state. This is no small thing. Local parties frequently part company from the state and national party in order to appeal to the social, political, cultural, and demographic profiles of their communities. No such pervasive suppression of political activity has ever been accepted by an American appellate court with scrutiny so deferential and perfunctory. *See Landell*, 382 F.3d at 143-44.

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[6] A fig leaf provides that incumbents may spend only 85 or 90% of the full limits (depending on the race). See Vt. Stat. Ann. tit. 17, § 2805a(c). This just shows that the Legislature understood that offense is better than defense; not a word in the record suggests that this marginal differential is sufficient to overcome the numerous and powerful advantages of incumbency.

III

Delay pending remand saves us nothing. No matter what happens on remand, there will be an appeal by one side or the other, maybe both. And in the interval – while the case is on remand in the district court, and during the post-remand appeal – the holdings of the majority opinion will be law of this Circuit. The green light has been given to New York and Connecticut (signatories to the States' amicus brief in support of the Act), the hundred counties, and the thousand municipalities under our jurisdiction, to consider and adopt similar limitations on campaign expenditures.

Moreover, the terms of the remand create problems of their own. What evidence is a judge supposed to examine to determine whether one type of regulation or one particular dollar amount is "as effective" as another at preventing corruption or conserving an office-holder's time? *See id.* at 133-36. Worse, the district court is being asked to make findings as to what level of spending will induce Vermont politicians to make corrupt decisions. *See id.* at 134-36. This kind of inquiry is grossly inappropriate for a federal court.

IV

There is another (overriding) problem that cannot be fixed on remand. Obviously, the Act was engineered to provide an opportunity for the Supreme Court to revisit existing law in this area. The Vermont Secretary of State has publicly noted the "express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*." Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001GAMemoCF.html. But until the Supreme Court alters course, *we* must follow straight.

See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Activists on every side may start or incite litigation with test cases and test laws. But it is not our role to provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject. This is a matter of hierarchy.

V

Would any judge uphold *any* limit on political speech if it were not that many constitutional-law professors and news media lend their prestige and voice to such measures? It is a big mistake, however, to decide a case on the buried assumption that these self-described protectors of the First Amendment confer a reliable imprimatur.

Constitutional rulings cannot safely be made on the assumption that constitutional-law professors serve the Constitution as disinterested scholars and technocrats. These professors take no oath to support the Constitution. Granting that some of them have expertise derived from long and painstaking study, we should keep in mind that many of them regard the Constitution instrumentally – the way a safecracker regards a safe.

Similarly, the news organs are interested players in political controversy. It is a fallacy to think that the press is a reliable defender of speech or that the First Amendment is safe in its hands. True, the mainstream press assiduously defends its own expressive and commercial rights, as well as the rights of those whose speech generates saleable news and those who do not compete with the press for influence (such

as skinheads, pornographers, performance artists, and the like). But no one should be surprised that the largest news media, secure in their editorial powers, join avidly in suppressing speech by competing sources of information and opinion at campaign time.

One arresting irony of this case is that the present Act can be used to limit the speech of the newspapers and the broadcast media. If a newspaper wishes to publish a story on a candidate and requests a photo, interview, or statement, and if the candidate provides such materials, the value of the ensuing publication counts against the candidate's contribution and expenditure limits. *See Landell Dissent*, 382 F.3d at 168-69. And in time, Vermont's legislators may conclude that the newspapers and broadcast media so control the public agenda, so forcefully channel legislative energies to serve publishers' views and interests, and so thoroughly monopolize the time of legislators vying for journalistic coverage and approval, that some reasonable limits should be placed on them. The Fourth Estate may be able to defend itself, but under the majority's decision, the Fourth Estate may not be able to get much help in the federal courts of this Circuit.

* * *

States may be laboratories of democracy, and they should have leeway to experiment, but innovation is limited by the Constitution. The Act at issue in this case is as unconstitutional as if Vermont were to create a dukedom, apply the thumbscrew, or tax Wisconsin cheese.

JOSE A. CABRANES, Circuit Judge, with whom WALKER, Chief Judge, and JACOBS and WESLEY, Circuit Judges, join, dissenting from the denial of rehearing in banc:

I am pleased to join the opinions of Chief Judge Walker and Judge Jacobs, dissenting from the denial of rehearing *in banc*. I add only a brief comment.

In his comprehensive and fully persuasive dissent from the decision of the panel, with which I concur fully, Judge Winter ably and admirably identified the grave constitutional concerns raised by Vermont's Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64"). Judge Winter's opinion is a *tour de force* and, as Judge Jacobs aptly observes, a great read. I take this opportunity to commend Judge Winter's opinion to readers, including most especially the Justices of the Supreme Court. I write separately only to reemphasize one concern with our Court's decision to deny *in banc* review of this case.

Under *Buckley v. Valeo*, 424 U.S. 1 (1976), Act 64's campaign expenditure limits are, without a doubt, unconstitutional. *See, e.g., Buckley*, 424 U.S. at 39 (recognizing that campaign expenditure limits, even when "neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms'"). In our system, the Supreme Court is free to revisit this question and free to overrule its own precedents. A court of appeals is not at liberty to do the same.

The particular expenditure limits imposed by Act 64

are so laughably low[1] that they cannot but impede meaningful debate of public issues in violation of the First Amendment's guarantee of free speech. *See Buckley,* 424 U.S. at 93 n.127. The attempts of the Vermont legislature to dress up the "legitimate" rationales buttressing Act 64—fighting corruption and conserving public officials' time—collapse under the weight of Act 64's more probable consequences, which include (1) an almost certain and drastic reduction of political speech, (2) potentially insurmountable disadvantages to challengers of incumbents, and (3) severe limitations on press coverage of political races. *See Landell v. Sorrell,* 382 F.3d 91, 176-82 (2d Cir. 2004) (Winter, J., dissenting).

Where government seeks to "regulate political speech the way it regulates public utilities," *id.* at 153, and protects incumbents at the expense of political expression, it is the role of the courts to defend the Constitution and to promote the principles of free speech that sustain our democratic order, not to enable bald-faced political perfectionism.

The majority's ruling is a clear departure from the Supreme Court's ruling in *Buckley.* I therefore dissent from the denial of rehearing *in banc.*

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[1] See Vt. Stat. Ann. tit. 17, § 2805a (limiting campaign expenditures based on office candidate is seeking: $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, state treasurer, auditor of accounts or attorney general; $4,000 for state senator, plus an additional $2,500 for each additional seat in the senate district; $4,000 for county office; $3,000 for state representative in a two-member district; and $2,000 for state representative in a single-member district).

Supreme Court, U.S.
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Nos. 04-1528 & 04-1530

In the
SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
Petitioners,

v.

WILLIAM H. SORRELL, *ET AL.*,
Respondents.

On Petitions For Writs Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

RESPONSE AND PARTIAL OPPOSITION TO PETITIONS FOR WRITS OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc.; Political Committee; Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in 04-1530*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; Will Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 and 04-1530*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 and 04-1530.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, Dale Gray, Lauren Bowerman, John McNight, George Rice, Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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STATEMENT OF THE CASE

I. Act 64

The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in Vermont politics. The hearings unequivocally demonstrated that Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. The hearings showed that the never-ending desire for campaign money often determined the positions of officials on issues, what matters were given legislative priority, who got access to officeholders, and how officials spent their time.

Both Republican and Democratic politicians did not mince words in describing the threat to the electoral process. As Democratic Senator Peter Shumlin confessed to a Senate panel, "I've got to tell you that I wish I could walk up and down this hall now as President Pro Tem and tell you that I know with a clear conscience that I'm not making decisions that are based upon that whole lot of money I raised." Ex. Volume-I at E-0291. Governor Howard Dean was equally blunt in his inaugural address: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." *Landell v. Sorrell*, 382 F.3d 91, 96 (2nd Cir. 2004), reproduced in the Appendix to Petition for a Writ of *Certiorari* in No. 04-1528 ("App."), at 93a-94a. Representative Marion Milne, a Republican, expressed a like concern about:

> candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity.

Ex. Vol.-II at E-0732 (Trial Exhibits).

Ultimately, Act 64 was the product of over 65 hearings before five legislative committees at which 145 witnesses testified. App. 31a-32a, 99a. The Legislature

heard from citizens, experienced candidates for Vermont office, public officials, political party leaders, experts on the campaign finance systems of other states, and legal experts from around the country. App. 100a.

At the conclusion of the hearings, both chambers of the Legislature agreed upon Findings with respect to the financing of political campaigns. Those Findings detail how large campaign contributions and unrestrained campaign expenditures had reduced public confidence in government, caused the public to believe that their elected officials were unduly influenced by monied interests, marginalized regular citizens from the political process, and had forced officials to divert their time and energies from their duties to endless fundraising. App. 101a-104a.

Based on its own experience and the full record before it, the Legislature determined that contribution limits and voluntary spending limits alone had been and would continue to be insufficient to deter political corruption and its appearance, to permit officials to devote time to their duties, and to restore public confidence in government. It concluded that, in addition to contribution restraints, mandatory limits on candidate expenditures would be an essential part of any meaningful campaign finance law. 17 V.S.A. §2805a (App. 6a-7a).

Such legislation, it found, was necessary to implement more fully Article 8 of Chapter I of the Vermont Constitution, which declares: "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." App. 35a.

In setting the appropriate expenditure levels, the Legislature linked the limits to particular offices. It painstakingly considered factors unique to Vermont such as population, media costs, historical information on past spending in campaigns, Vermont's previous voluntary

spending limits, its members' own individual experiences as candidates, and the testimony of numerous witnesses concerning the appropriate levels for the limits. App. 32a-33a. It set the limits at levels sufficient to ensure effective and robust campaigning in Vermont. App. 100a.

The Legislature took equal care in establishing the levels for Act 64's contribution limitations. 17 V.S.A. §2805 (App. 4a-6a). It examined, *inter alia*, campaign finance summaries for various legislative and statewide races in Vermont from 1978 to 1996, as well as reports of contribution patterns. App. 100a. From this evidence it determined what types of contributions are considered large in Vermont and what amounts would permit effective campaigning. The Legislature settled upon contribution figures that are well tailored to the Vermont political landscape.[1]

II. Proceedings Below

This case is a combination of three separate lawsuits, all of which presented facial challenges to Act 64. App. 104a, 110a. After an intensive period of discovery, the case proceeded to trial. The District Court heard extensive testimony over ten days of trial and received voluminous exhibits. In all, the Court heard from 30 witnesses -- including seven expert witnesses and numerous candidates, officeholders and citizens -- and admitted approximately 135 exhibits, amounting to more than 3,000 pages.

After reviewing the trial evidence and the evidence presented to the Legislature, the District Court upheld nearly all of the contribution limits of Act 64.[2] Regarding

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[1] Contrary to the assertion of the Petitioners, Act 64 does not broadly criminalize violations of the campaign finance law. Civil penalties govern all but the failure to file campaign finance reports. 17 V.S.A. §2806(a-b).

[2] The Court invalidated Act 64's limits on out-of-state contributions and on the amounts political parties could contribute to candidates. App. 67a-68a.

the expenditure provisions, the District Court found that they were supported by compelling interests and were set at appropriate levels for Vermont. App. 66a. It noted that: "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill." App. 66a. The Court refused to sanction the limits, however, based on its view that were prohibited by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). App. 66a.

The Court of Appeals carefully reviewed the full trial court record. App. 111a, 129a, 144a, 157a. It gave special permission for the parties to submit the entire 2,395-page transcript to the appellate court.

The Second Circuit concluded that Vermont has a compelling interest in safeguarding the political process from the corruption and the appearance of corruption created by unfettered campaign spending and the contributor-dominated system that results from it. The Court found that expenditure limits were necessary in order to protect the public's faith in the fundamental principle that the government is accessible and accountable. App. 134a.

The Second Circuit further held that Vermont had an additional compelling interest in assuring that candidates and officeholders spend less time fundraising and more time interacting with voters and performing their official duties.[3] App.135a. Based on the Court of Appeals' independent examination of the record, it determined that: "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office." App. 139a,

[3] Vermont asserted five compelling interests as justification for Act 64's expenditure limits. App. 127a. Since it found two of the interests sufficient to uphold the spending limits, the Court of Appeals did not analyze the remaining interests. App. 145a.

144a. The record, it concluded, provided detailed descriptions from knowledgeable witnesses of the ways in which large donors and special interests command the available time of candidates and public officials. Such evidence more than supported the compelling nature of this "time protection" interest. App. 139a-143a

The Second Circuit also ruled that the expenditure limits were set at levels that directly advanced the above compelling interests and that would permit effective campaign advocacy. App. 148a, 156a. It nevertheless remanded to the District Court for additional narrow tailoring analysis. It sought more evidence as to other possible regulatory options available and whether higher expenditure limits might equally serve the identified compelling interests. App. 157a-158a.

As to Act 64's contribution limits, the Second Circuit upheld all but the out-of-state contribution limitation. App. 184a. It endorsed the District Court's conclusion that "[l]arge contributions to candidates have undermined public confidence in Vermont's political system." App. 36a. The appellate court found that the contribution limits furthered compelling interests in reducing corruption and its appearance, and that the levels of the limits would permit vibrant campaigning and debate of issues, and were appropriately set for Vermont. App. 56a.

In addition, the Court of Appeals sanctioned the non-conclusive, rebuttable presumption of 17 V.S.A. §2809(d). That provision creates an evidentiary presumption that certain expenditures of parties and political committees to support six or fewer affiliated candidates are presumed to have been coordinated with those candidates. Such a presumption may be rebutted by evidence that there was, in fact, no coordination.[4] App. 86a.

[4] While Petitioners now purport to complain that Act 64's definition of "expenditure" is overly broad, 17 V.S.A. §2801(3), they did not challenge that definition in their complaints in the

SUMMARY OF THE ARGUMENT

Issuance of a writ of *certiorari* as to Question One above is well justified. There is a marked division among the Courts of Appeals of the Second, Sixth and Tenth Circuits concerning whether this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) constitutes an absolute bar to limitations on the amounts that candidates may spend in an election. Even assuming it does not, the split extends to a second issue: is the interest in preventing corruption and the appearance of corruption in elective politics, and the interest in freeing candidates from the rigors of endless fundraising to permit them to focus on their official duties, sufficiently compelling to meet the exacting scrutiny of *Buckley*.

This Court should resolve the disagreement among the Circuits on this important issue at the earliest possible time. In the absence of such review, States and local governments will be left with conflicting guidance as to whether spending limits are permissible, and, if so, what precise constitutional standards govern them. They will likely consume precious legislative resources and engage in litigation surrounding such limits all on an uncertain legal playing field. Providing review at this

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District Court or in their briefs to the Court of Appeals. Aside from not properly raising this issue, Petitioners rely heavily on citations to information found in the dissenting opinion of Judge Winter. That opinion, however, includes extensive discussion of material that is not part of the record and was not considered below. Consideration of such information violates the principles of judicial notice. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 289 n.9 (1974) (Due Process forbids court from relying on disputed factual material when parties have not had an opportunity to contest it). Indeed, the resulting assumptions, that volunteered services, newspaper articles and monies spent defending actions under 17 V.S.A. §2809 are automatically treated as campaign contributions and expenditures, are not accurate.

time will bring clarity and provide direction on this vital issue.

This case is the ideal vehicle for such review. It presents a detailed legislative record as well as testimony and exhibits from a substantial trial. It provides convincing proof from the Vermont experience that contribution limits and voluntary spending caps alone are insufficient to deter corruption and its perception or to protect officials from being distracted from their duties by the need to fundraise. This never-ending desire for campaign money has forced candidates to become beholden to large groups of contributors and special interests that control access to such funds. The record verifies that, as a consequence, officials sometimes adopt positions on issues, set legislative agendas or take other actions based on concerns over losing or gaining such funding. All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.

Based on such a record, and contrary to the contentions of Petitioners, the Second Circuit's ruling does not conflict with *Buckley*. *Buckley* is not a *per se* bar to the enactment of spending limits and the interests offered in support of them here are compelling and were fully supported at trial.[5]

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[5] On June 4, 2005, the Legislature passed Bill S.16 amending portions of Vermont's campaign finance law. It awaits consideration by the Governor. Among other things, S.16 adjusts Act 64's spending limits for inflation, retroactive to 2001, and makes explicit what was implicit previously, namely that unaffiliated newspaper articles are not considered contributions or expenditures. *See* http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/passed/S-016.HTM. These limited amendments do not affect the propriety of granting a writ of *certiorari* as to Question One.

Lastly, Petitioners' request for a writ of *certiorari* concerning the contribution limitations and the rebuttable presumption of Act 64 do not meet the standards for issuance of the writ. There is no current quarrel among the Circuits on these issues, and Vermont's law is fully consistent with this Court's precedents. The Petitions should be denied as to Questions Two and Three above.

ARGUMENT

I. Issuance Of A Writ Of *Certiorari* Is Warranted At This Time To Resolve A Recurring Issue of National Import That Has Divided The Courts Of Appeals

A. There are Two Divisions in the Circuits

Last term, Vermont joined in an *Amici Curiae* brief to this Court that highlighted the pronounced split among the Courts of Appeals concerning the constitutionality of expenditure limits. *See* Brief of the States of Connecticut, *et al.*, as *Amici Curiae*, in *City of Albuquerque v. Homans*, No. 04-413, at pp.1-5. The divide among the Courts of Appeals operates on two distinct levels: first, the Courts disagree as to whether *Buckley* foreclosed all consideration of spending limits; and second, they differ as to whether the interests relied upon by the Second Circuit in upholding the limits of Act 64 are compelling.

In *Landell*, the Second Circuit rightly found that this Court's ruling in *Buckley* does not constitute a complete bar to enactment of expenditure limits and that the interests in policing corruption and the appearance of corruption and the interest in protecting officials from being distracted from their duties by fundraising, justified Vermont's expenditure limits.

Prior to that ruling, the Sixth and the Tenth Circuits had held both that spending limits were absolutely

prohibited by *Buckley*[6] and that the compelling interests identified by the Second Circuit in *Landell* either were rejected by *Buckley*[7] or were legally insufficient to support expenditure limits. *Homans v. City of Albuquerque*, 366 F.3d 900, 907 (10th Cir. 2004), *cert. denied*, 125 U.S. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 913-19 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998).

The Circuit disagreements as to both of these constitutional points present questions worthy of *certiorari* review.

B. The Constitutionality of Expenditure Limits Is A Recurring Issue Of National Significance

In the years since *Buckley*, efforts at campaign finance reform across the country have been legion. Vermont's experience has been that contribution limitations alone are insufficient to curb corruption and its appearance, to protect officials from endless fundraising so that they might focus on their duties, or to preserve the public's confidence in its government and elected representatives. Vermont enacted a comprehensive campaign finance reform statute to address those issues. Expenditure limits are an important part of that law.

Vermont is not alone in its conclusion that expenditure limits are a necessary part of campaign finance reform. In the last seven years, there have been decisions from Courts of Appeals in the West, the Mid-West and the East concerning the constitutionality of spending limits. *See supra* Section I(A). As detailed

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[6] While the Tenth Circuit suggests that *Buckley* is not an outright bar to spending limits, 366 F.3d at 915, the majority held that such limits could not be supportable "as a matter of law." *Id.* at 914.

[7] Although *Homans* held that protecting officials' time might be a compelling interest, it ruled the city had not proven its limits were necessary for that purpose. 366 F.3d at 912.

above, those decisions came to different conclusions. Their existence, however, is testament to the fact that other states and local governments will be considering spending limits and need guidance as to the circumstances that might justify such measures.

In fact, since the Second Circuit's decision in *Landell*, at least three states, Massachusetts, Oregon and North Carolina, have introduced legislation that includes limits on expenditures. *See* Brief of Respondent-Intervenors Vermont Public Interest Research Group, Inc., *et al.* ("VPIRG"), at Section I(B) n.4.[8]

Legal and political commentators as well have written and discussed the need to employ spending limits to curb campaign abuses, protect officials' time and restore faith in our democracy.[9] Such contentions are only likely to encourage the adoption of measures aimed at restraining expenditures.

In short, spending limitations are being, have been or will likely be considered in various jurisdictions throughout this country. Given that fact, the constitutionality of such limits presents a clear issue of national import that should be resolved by the Court at the earliest time.

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[8] Similar efforts have often been made at the federal level. *See, e.g.*, S. 1502 (106th Congress) (seeking limits on campaign expenditures in Senate campaigns); H.R. 77 (105th Congress) (similar limits for House races). Indeed, a joint congressional resolution has expressed the view that the First Amendment permits campaign expenditure limits. H. Cong. Res. 377 (106th Congress).

[9] *See, e.g.*, Mark Alexander, *Campaign Finance Reform: Central Meaning And A New Approach*, 60 Wash. & Lee L. Rev. 767, 814-21, 835-39 (2003); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1415, 1424-25 (1986).

C. The Remand Further Counsels In Favor Of Granting *Certiorari* Review

The Second Circuit's decision to remand the expenditure limits to the District Court for further analysis of narrow tailoring weighs in favor of issuing a writ of *certiorari* at this time. The remand leaves the constitutionality of and the constitutional test for judging expenditure limits in an uncertain state for the foreseeable future. This not only places a burden on Vermont, it leaves other states and local governments with insufficient guidance regarding what facts and circumstances would support such limits.

The uncertainty created by the opinion below works at three levels: (1) does *Buckley* permit any spending limits; (2) are the compelling interests identified by the Second Circuit sufficient to support expenditure limits; and (3) what type of narrow tailoring must such limits pass under the First Amendment?

The Circuit split identified on the first two of these issues means that states and local governments in some parts of the country might seek to adopt expenditure limits based on the compelling interests set out by the *Landell* Court. As shown above, some have already done so.

During the remand period, legislatures could devote precious time and resources to the debate and consideration of expenditure limits. Enacted provisions likely would be the subjects of court challenges. If the Second Circuit's decision relied upon insufficiently compelling bases, or failed to address additional compelling interests or alternative constitutional analyses that might support expenditure limits, such efforts would amount to a great waste of public resources.

The same is true regarding the Second Circuit's lengthy description of the narrow tailoring analysis that should be undertaken on remand. App. 146a-167a. If the tailoring inquiry set out by the Second Circuit for remand

proves not to be the precise legal standard that should be employed, it would burden Vermont and other entities that might adopt spending limits. They would be forced to defend such limits in court proceedings that would likely follow that tailoring analysis. If the Second Circuit's test is not completely accurate, there will be an additional squandering of legislative and judicial resources.

Granting a writ of *certiorari* at this time makes both legal and practical sense. It will resolve the division among the Courts of Appeals and will provide instruction to all governmental bodies on this issue of central concern. While this Court declined to issue writs of *certiorari* in *Homans* and *Kruse*, the unique and voluminous legislative and trial records in this appeal make it more suitable for *certiorari* consideration.

II. The Ruling Below Is Consistent With *Buckley* And Is Well Supported By The Record

While Petitioners accurately point out the discord among the Courts of Appeals on the expenditure limits issue, they incorrectly argue that the Second Circuit's decision in *Landell* conflicts with this Court's precedents. The opposite is true. *Landell* is faithful to this Court's jurisprudence and the record establishes its validity.

A. The Second Circuit's Ruling Comports With *Buckley*

Buckley does not present a *per se* bar to adoption of expenditure limits. App. 113a-118a. Instead of a prohibition on spending ceilings, *Buckley* and its progeny have established only that expenditure limits are subject to closer exacting scrutiny than contribution limitations. *See McConnell v. Federal Election Comm'n,* 540 U.S. 93, 134 (2003). But, exacting scrutiny[10] does not sound the

[10] While the *Buckley* Court referred to "exacting scrutiny," 424 U.S. at 44, it did not cite strict scrutiny as the standard of review. *Cf. Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 386 (2000).

death knell for campaign finance laws. App. 125a-126a (noting same). As the Supreme Court has cautioned when applying the strict scrutiny standard of constitutional review: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring)).

And, this Court has validated a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (statute restricting independent expenditures by corporations or campaigns); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering activity near polling places).

Indeed, one looks in vain in *Buckley* or later cases for a Court pronouncement that spending limits can never be sustained under the First Amendment. That silence is instructive. The Second Circuit correctly held that *Buckley* "did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations." App. 114a.

Likewise, the Second Circuit rightly determined that the interest in avoiding corruption and the appearance of corruption coupled with the "time protection" interest are sufficient to meet the exacting scrutiny demanded by *Buckley*. Contrary to the Tenth and Sixth Circuits, *Buckley* does not foreclose consideration of the anti-corruption rationale with respect to restrictions on campaign spending. App. 135a (suggesting same). The *Buckley* Court declined to accept the anti-corruption rationale based upon the factual record presented. It did not make that ruling as a matter of law.

As the Second Circuit found, the *Buckley* Court "simply held that based on the record before it, '[n]o

governmental interest that has been suggested is sufficient to justify'" spending limits. App. 114a (quoting *Buckley*, 424 U.S. at 55). That record was also limited due to the Federal Election Campaign Act's ("FECA's") expedited review procedure. *Kruse*, 142 F.3d at 919 (Cohn, D.J., concurring) (*Buckley* based "on a slender factual record").

"Accordingly, after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record such that some expenditure limits could survive constitutional review." App. 114a. *See Nixon v. Shrink Missouri Government PAC ("Shrink")*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring) (suggesting spending limits may be sustainable based on post-*Buckley* factual experience).

Petitioners' suggestion that corruption and the perception of corruption have no force outside of the contribution limit context, is unsupportable. Such reasoning reflects just the sort of "crabbed view of corruption and particularly the appearance of corruption" that this Court rejected in *McConnell*. 540 U.S. at 152-54. Instead, this Court has given an increasingly broad view of corruption and its appearance that extends beyond the archetypal example of vote buying. *Id*. at 153 (Congress has the power "to address more subtle but equally dispiriting forms of corruption"). It has made plain that "in addition to the actual influence of campaign contributions on politicians' behavior, the perception of corruption was an important part of this compelling state interest because it 'could jeopardize the willingness of voters to take part in democratic governance.'" App. 128a (quoting *Shrink*, 528 U.S. at 390). The spending limits of Act 64 address just such concerns regarding corruption and the perception of corruption in the political process.

Similarly, the time protection rationale was not fully considered in *Buckley* and is compelling. The *Buckley* Court was careful to state that only three possible

interests had been offered to justify FECA's limits: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. 424 U.S. at 55-56.

While the Sixth Circuit equated the time protection concern with the third interest above, the Second Circuit correctly deemed it distinct. The Second Circuit found that "the language of *Buckley*, as well as an examination of the *Buckley* briefs, oral argument, and subsequent commentary from judges, and scholars," makes plain that the time protection interest and the interest in reducing costs of campaigns are different. App. 138a. *Accord Homans*, 366 F.3d at 911-12.

Indeed, three Justices of the United States Supreme Court have identified the protection of officials' time as a governmental interest that might support the constitutionality of spending limits. *See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n ("Colorado Repulican")*, 518 U.S. 604, 649-50 (1996) (Stevens & Ginsberg, JJ., dissenting); *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting) (suggesting possibility of "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1298 (1994) (endorsing time protection interest) [hereinafter "Blasi, *Free Speech*"].

Justices Stevens and Ginsberg have rightly acknowledged this critical interest supporting spending limits and how it may impact First Amendment values:

> It is wrong to assume that the net effect of limits on contributions and expenditures -- which tend to protect equal access to the political arena, *to free candidates and their staffs from the interminable burden of fund-raising*, and to diminish the importance of repetitive 30 second commercials -- will be adverse to the interest in informed debate protected by the First Amendment.

Colorado Republican, 518 U.S. at 649-50 (Stevens & Ginsberg, JJ., dissenting) (emphasis added).

In related contexts, this Court and Courts of Appeals have found the interest in time protection to be compelling. In *Buckley*, this Court relied upon that interest to sustain the public financing provisions of FECA. 424 U.S. at 91. Courts of Appeals have noted its compelling nature in upholding state public financing laws. *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). App. 137a.

The Second Circuit correctly concluded that Vermont's interests in avoiding corruption and its appearance and in protecting officials' time are sufficiently compelling to meet the exacting scrutiny demanded by *Buckley*.[11]

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[11] Also, unlike the law at issue in *Buckley*, Act 64 only regulates the campaign expenditures *of or attributable to candidates*. Candidates choose to run for office. They may be required, *inter alia*, to obtain a certain number of signatures in order to appear on the ballot or may be required to be a resident of a state to even qualify as a candidate. Thus the system recognizes that by entering the political arena, candidates must agree to abide by certain rules and regulations to maintain the integrity of and public confidence in the electoral process. Vermont's expenditure limits follow in that tradition. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 47-48 (1998).

B. The Record Evidence Fully Supports The Compelling Interests Identified Below

Contrary to the positions of Petitioners, the unprecedented factual record of this case more than establishes the critical interests identified by Vermont in support of its spending limits. The Vermont Legislature held exhaustive hearings and made detailed Findings of Fact concerning Act 64. App. 122a-124a; 134a-135a. The District Court was no less thorough in its review of the extensive trial evidence.

The Second Circuit independently reviewed the entire record and endorsed the finding of the District Court that the "'e]vidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics'" and that "'they have reason to feel that way.'" App. 128a-129a (citation omitted).

As the Second Circuit concluded, the source of such public concern comes not only from large contributions to candidates, but also from increasing campaign expenditures and the runaway "arms race" mentality that grips candidates and forces them to give access and preferences to monied interests. It also forces them away from their governmental duties and into a seemingly endless pursuit of funds. App. 128a-146a. The trial record fully supports these findings.[12]

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[12] Petitioners' underlying premise, that spending limits are somehow inconsistent with democratic governance, is incorrect. Prior to *Buckley*, numerous states and localities had long functioned with such limits. Internationally, many democracies, including Canada and England, limit the amounts candidates may spend to be elected. Roland S. Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, 97 (1996).

1. Vermont's Spending Limits Avoid The Reality And Appearance Of Corruption In Politics And Government

The full factual record in this case presents far more evidence of the pervasive effects of unlimited campaign spending than was before the *Buckley* Court, and it leads to a different conclusion. App. 135a, 144a-146a. Vermont's experience in the years since *Buckley* convincingly establishes that contribution limits alone cannot stem corruption and its appearance in electoral politics.

Trial testimony of knowledgeable Vermont citizens, officeholders, candidates, and expert witnesses confirmed how a system of unlimited campaign spending undermines public confidence in government and leads voters to perceive that meaningful access to and influence over politics is only for the wealthy and special interests. *See, e.g.*, Trial Transcript ("Tr.") IX-57-58 (voters believe high spending campaigns reflect that candidates are running for special interests); Tr. IX-130 (with unlimited campaign spending, average citizens do not feel like "players" in politics); Tr. VII- 89-90.

In the words of the Second Circuit, as a result of such perceptions, "citizens in Vermont have consistently demonstrated a belief that the attention of their public representatives may be available for a price." App. 129a.

A survey by Celinda Lake, a nationally recognized public opinion researcher, confirmed that Vermonters are extremely concerned about the influence of special interests in the political process. Nearly three quarters of voters say that ordinary citizens do not have enough influence over politics and government in Vermont (74%), while similar percentages believe that wealthy individuals and large corporations exercise too much influence over politics and government (70% and 71%, respectively). App. 130a.

As the evidence showed, the public sees and understands that, even when individual contributions are limited, the pressure to raise unlimited amounts continues to make fundraising a central preoccupation of candidates, and that such fundraising heightens the potential for abuse of the system by special interests. *See, e.g.*, Ex. Vol.-III at E-0775.

Indeed, as a number of witnesses described, there is an "arms race" mentality that causes candidates to amass greater and greater campaign war chests, not because they are needed to conduct an effective campaign, but simply because of the candidates' fear of being outspent by an opponent.[13] Tr. VIII-57; *see also* Tr. VII-77-78, 90, 90; Tr. V-32-33; Tr. IX-134-35.

The need to have an endless amount of funding has a direct impact on the functioning of government and creates, at the very least, the appearance of corruption. Lawmakers are often fearful of upsetting their funding sources. The Second Circuit had before it strong evidence of how that fear impacts the legislative process in Vermont. For example, it can cause officials to take positions they might not otherwise have taken. "Candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds." App. 131a; *see McConnell*, 540 U.S. at 133-34 (noting similar pressures). *See* Tr. VII-56, 66 (party and

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[13] The trial testimony of two of Petitioners' witnesses about the 1998 Rutland County Senate race vividly demonstrates this state of mind. George McNeill, testifying for the Republican State Committee, argued that the Republican candidate needed to spend large amounts to overcome powerful opponents such as Steve Howard, a Democrat, who is one of the *Randall* Petitioners. Tr. II-145. Mr. Howard testified that he needed to spend large amounts in 1998 in order to overcome his opponents' advantages. Tr. IV-171.

party leaders urged legislators not to oppose pharmaceutical interests for fear of being "shut off in the next election cycle from any contributions"); Tr. VIII-43 (when voting on issue affecting ophthalmologists, lawmaker considered potential loss of further support from that group).

The money factor can also determine how officials set the legislative agenda and who gets access to the officials. Voluminous evidence established below that "'there is an agenda out there that is pretty much set by folks that are not elected.'" App. 132a. In light of the need for money, officials "pay attention to which contributor 'wants what to happen in terms of the language of the bill, in terms of calendaring the bill, in terms of writing the rules.'" App. 131a. Similarly, if there are telephone calls to be returned and limited time to do it, contributors' calls are often given preference. App. 132a & n.12. The Second Circuit concluded that "[c]andidates, often with great reluctance, accept the bargain with contributors so that they do not lose large sources of potential fundraising for the 'arms race' in which they feel compelled to participate." App. 132a-133a; *see McConnell*, 540 U.S. at 134.

Vermont citizens are well aware of this interaction and it has marginalized them from the political process in favor of monied interests. As one former Legislator put it:

> Citizens have reported that they do not vote because "'[a]ll the big money controls everybody in Montpelier anyways.' ... They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong.

App. 130a.

Contribution limits alone simply cannot guarantee that candidates will escape the influence of wealthy or special interests. For example, in Vermont, powerful interests such as the ski industry can, even under Act 64's contribution limits, still funnel large sums to single

candidates with contributions from each of the state's ski companies. Tr. VIII-192-94. Likewise, the ability of special interests to "bundle" groups of contributions creating, in essence, a single, extremely large donation, only exacerbates such concerns. App. 133a.

Curbing campaign spending, and the corresponding reliance on groups of big donors and special interests, will change "the shape and nature of the marketplace," and politicians will no longer need to continue "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII-57. Under such a system, candidates will no longer fear that opposing the causes of such interests will result in a severe disadvantage in the race for unlimited campaign funds. Only with spending limitations in place can the public be confident that there is little need for candidates to curry favor with groups of large donors.

Based upon such considerations, the Second Circuit correctly found that:

> Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates. The evidence at trial demonstrated that money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power. The accessibility and accountability of public officials—and the public's faith that Vermont's

government is accessible and accountable—are fundamental to any democratic system.

In our view such influence of campaign contributors is pernicious because it is bought. Certain private citizens and organizations should not be given greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns. Even with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors pay for their campaigns.

App. 134a (citations omitted).[15]

2. Vermont's Spending Limits Assure That Officeholders Will Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties

The record also well supports the Second Circuit's determination that spending limits directly further the State's compelling interest in freeing elected officials from the pressures of fundraising so that they may focus their attention on carrying out their official duties. It endorsed the finding of the District Court that Vermont had proven

[15] The argument of Petitioners and the Dissent below, that expenditure limits amount to incumbency protection devices, could not be further from the truth. It is the existing system that gives incumbency such an enormous advantage. The evidence in this case establishes that the greatest benefits of incumbency are the abilities to greatly outspend opponents and to amass huge war chests from large, monied interests. This makes it nearly impossible to mount a challenge to current officeholders. Tr. X-80-81. The evidence demonstrated that spending limits would reduce the advantages of incumbency. App. 152a. Further, Act 64 actually makes an accommodation for any benefits of incumbency by allowing non-incumbents to spend more than incumbents. 17 V.S.A. §2805a(c); App. 7a.

that "'the need to solicit money from large donors at times turns legislators away from their official duties.'" App. 135a. Act 64's spending limits directly address this critical problem.

The increasing amount of time that candidates must spend raising campaign funds was a prominent concern during the public debate leading up to the enactment of Act 64. In a January 1997 article, former Vermont Secretary of Administration David Wilson noted that: "Politicians are forced to spend as much time begging as they do campaigning." Ex. Vol.-III at E-0773.

Legislators such as Senator William Doyle voiced this same worry. He stated that Act 64 was necessary so that "there will be increased time for real debate; [and] that candidates will be able to concentrate more on issues rather than raising public money." Ex. Vol.-I at E-0092. *See also* Blasi, *Free Speech*, 94 Colum. L. Rev. at 1298 (reducing time spent fundraising enhances "quality of representation" provided by officials).[15]

[15] Both Democrats and Republicans in Congress have acknowledged how the need to fundraise detrimentally impacts the functioning of government. *See, e.g.*, 147 Cong. Rec. S2857 (daily ed. Mar. 26 2001) (statement of Sen. Byrd) ("It is a vicious circle that requires candidates to spend more and more time raising money and less and less time listening to the people and working for the people...."); 131 Cong. Rec. S74 (daily ed. Jan 3, 1985) (statement of Sen. Goldwater) (The "demands of the fundraising treadmill will force more and more office holders to neglect their duties to patronize big donors and PAC events around the Nation. The 3-day legislative week is already becoming commonplace in Washington, D.C., so that Members can escape town to fulfill the never-ending quest for campaign funds.").

Such evidence was reiterated at trial. Former Legislator and then-Auditor of Accounts Elizabeth Ready described the effect of spending limits as follows:

> If I can go out and raise what I have to raise and know that those limits are in place, I can spend the whole rest of my campaign, once I have raised that money, out with the public, okay. I can go door to door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere making fundraising calls.

Tr. IX-129; *see* Tr. VII-57-62.

Similarly, former Lt. Governor and Congressman Peter Smith explained that the further one progresses politically, the more time one spends raising money and paying attention to groups of big money contributors. Tr. VIII-23-24. This constant pressure to raise money keeps the candidates away from the general public and distracts them from their official duties.[16]

Moreover, since much of their days are spent raising money, officials tend to give their most precious commodity – access time – to the persons and entities from which they obtain funds. The Second Circuit correctly determined that this has an impact on the information that candidates receive and the opinions they hear. "Even if candidates receive valuable information during every hour spent fundraising, their time is being controlled by those with campaign cash, and this effect is corrosive." App. 141a.

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[16] The public is well aware of this effect. Survey data confirmed that 85% of Vermonters were concerned that their elected officials are being diverted from their duties in order to raise money. App. 142a.

These results are harmful to good government, harmful to officials and candidates, and harmful to the people of Vermont. As the Second Circuit found: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." App. 142a.

Act 64 works to end that legacy by enabling officials to attend to their duties and to interact on a substantive level with voters. The Second Circuit's ruling that Act 64's spending limits directly further the compelling interest in permitting candidates and officials greater opportunity to devote themselves to government business and citizen interaction is well supported by the record.[17]

III. The Contribution Limits of Act 64 Do Not Warrant *Certiorari* Review[18]

There is no division in the Circuits concerning the constitutional standards governing contribution limits, and the ruling below is fully consistent with this Court's precedents. Petitioners have presented no basis for granting a writ of *certiorari* on this issue.

A. There is No Division Among the Circuits

The Petitioners concede that there is no split among the Circuits on the question of whether limits on contributions to candidates may be upheld under the First Amendment. Instead, they argue that this Court should take this question in order to "clarify" the law. Vermont

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[17] Respondents join in the arguments presented by Respondent-Intervenors VPIRG, *et al.*, at Section I(C)(3) of their brief addressing alternative bases for affirming the decision below and supporting issuance of a writ of *certiorari*.

[18] Respondents join in the arguments presented by Respondent-Intervenors VPIRG, *et al.*, at Section II of their brief explaining why the Court should deny review as to the rebuttable presumption found in 17 V.S.A. §2809(d).

Republican State Committee, *et al.* ("VRSC"), Petition at 19-20. There is nothing unclear about the applicable standard for evaluating contribution limits, however. *Buckley* and *Shrink* set out the First Amendment test for contribution limits, and the Courts of Appeals have followed it.

All of the courts considering limits on contributions to campaigns since this Court's decision in *Shrink* have upheld the limits. *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003), *cert. denied,* 125 S.Ct. 47 (2004); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002), *cert. denied,* 537 U.S. 1160 (2003); *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000); *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842 (8th Cir. 2000); *Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256 (M.D. Fla. March 20, 2000).

In addition, this Court has rejected requests for writs of *certiorari* in a number of cases that analyzed contribution limits, including *Eddleman* and *Frank* above and *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied,* 528 U.S. 1153 (2000).[19]

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[19] This Court has made clear that there is no reason to treat parties and PACs differently from individual contributors. *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 455-56 (2001); *see also California Democratic Party v. Jones*, 530 U.S. 567, 588-89 (2000) (Kennedy, J., concurring)(a majority of the Court permits states to limit the amounts parties spend in collaboration with candidates). Further, there is no conflict among the Circuits as to the constitutionality of contributions by political parties to candidates. *Missouri Republican Party v. Lamb*, 270 F.3d 567, 570-71 (8th Cir. 2001), *cert. denied,* 535 U.S. 1113 (2002); *Alaska*, 978 P.2d at 625-26; *Citizens for Responsible Gov't v. Buckley*, 60 F. Supp. 2d 1066, 1095 (D. Colo. 1999), vacated, 236 F.3d 1174 (10th Cir. 2000). Nor do Petitioners point to any dispute among the Circuits on the standards for limiting contributions by PACs to candidates. Several lower courts have upheld limits on such contributions by PACs. *Eddleman*, 343 F.3d at 1096; *Daggett*, 205 F.3d at 452, 462; *Kentucky v. Terry*, 108 F.3d 637, 648-49 (6th Cir.), *cert. denied,* 522 U.S. 860 (1997); *Gard v. Wisconsin*, 456 N.W.2d 809 (Wis.), *cert. denied,* 498 U.S. 892 (1990).

The only cases proffered by Petitioners as being "in conflict" with the above rulings pre-date this Court's 2000 decision in *Shrink*. VRSC Petition at 17 (citing cases in the Eighth and Ninth Circuits). Subsequent decisions from those Circuits, though, have followed the *Shrink* analysis and upheld contribution limits. The Eighth Circuit validated contribution limits of $275 for State House candidates, $525 for State Senate candidates, and $1075 for statewide candidates per election. *Adams*, 204 F.3d at 842. The Ninth Circuit confirmed limits of $400 for candidates for Governor and Lieutenant Governor, $200 for other statewide positions, and $100 for all other offices per election. *Eddleman*, 343 F.3d at 1096.

Petitioners' suggestion that Vermont's contribution limits, 17 V.S.A. §2805 (App. 4a-6a), are draconian is refuted by the decisions in other Circuits. Act 64 allows contributions to statewide candidates up to $400 per general election cycle. This is essentially the same as the limits of $200 per election for most statewide Montana races upheld in *Eddleman*.[20] They also compare favorably with contribution limits found constitutional in Missouri and Maine. App. 57a-58a. As the District Court found, "[p]roportionally speaking, Vermont's limits are perhaps

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[20] Montana's limits of $400 per election in the Governor and Lieutenant Governor races is also comparable to Vermont's $400 limit per election cycle given the relative size of the states. The population of Montana was 902,195 in 2000, one and one half times as large as Vermont's. In addition, since there are only one and one half months between the primary and general elections in Vermont, the overlap between the primary campaign and the general election campaigns is so significant that the two practically blend together. App. 60a. This alleviates the need for a separate limit for primary election contributions.

even more generous than those of Maine," because the relevant districts contain fewer voters for each candidate to reach.[21] *Id.*

B. Vermont's Contribution Limits Comport With *Buckley* and *Shrink*

Lacking divergence in the Circuits, Petitioners' last claim is that Act 64's limits violate the principles of *Buckley* and *Shrink*. The contention is meritless. Contribution limits will be upheld unless "the contribution limitation is so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Courts typically give great weight to legislative judgments and do not fine-tune the precise levels of the limits. *Shrink*, 528 U.S. 327; *Buckley*, 424 U.S. at 30. The Second Circuit correctly applied this standard. App. 168a-171a. There was not even a dissent on the panel below on this question. App. 194a.

Based on the costs of campaigning in Vermont, the history of campaign spending and campaign contributions, and other evidence examined by the Legislature and at trial, the contribution limits established by Act 64 would allow candidates to amass sufficient resources to run effective campaigns. App. 32a-33a, 39a-41a.

The evidence in the record of the one campaign conducted subject to the contribution limits prior to trial conclusively demonstrated that effective campaigns can be fully financed under Act 64's limits. In the 1999 contest for Mayor in the City of Burlington, Kurt Wright faced

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[21] Act 64's statewide limit is also at least as generous as the $500 per statewide election and $1,000 per election cycle limits upheld in Florida. *Florida Right to Life*, 2000 WL33733256 at *3. Florida allowed contributions two and one half times as large as Vermont's despite its likely higher costs and the fact that its population is 26 times greater. *See* www.census.gov.

incumbent Peter Clavelle. Subject to contribution limits of $200, the candidates in that race were not only able to raise more money than in previous mayoral races, they actually raised more money than in previous countywide state senate races. App. 58a-59a. Kurt Wright testified at trial that he ran an effective campaign in a competitive race against an incumbent. App. 41a.

Petitioners' suggestion that the District Court and the Second Circuit gave only cursory review to the contribution limits is unsupportable. The District Court examined the legislative record, took new evidence and, at times, interrogated trial witnesses. Its analysis was rigorous. In many instances, the witnesses offered contradictory testimony and the District Court had to make determinations of credibility. App. 40a.

For each piece of evidence that the Petitioners assert as support for their positions, VRSC Petition at 22-25, the record contains persuasive, countervailing evidence. For example, trial evidence showed that the limits of Act 64 were directed at amounts "considered suspiciously large by the Vermont public," App. 34a, that the limits affected less than 10% of overall contributions, App. 57a, and that, based on the standard Vermont practice of employing low-cost campaign methods and the relatively small cost of media, App. 44a, 155a-156a, effective campaigns can be run using the limits of Act 64, App. 41a & n.20, 171a. The 1999 Burlington mayoral race confirmed the validity of such evidence.

Petitioners' request that this Court reassess the Second Circuit's factual analysis on such points simply does not warrant *certiorari* review. They do not contend that the appellate court applied the wrong rule or misunderstood the law. At most, Petitioners' argument boils down to a criticism of the Second Circuit's application of the law to the facts. That Court's judgment, though, is in keeping with the approach of other Circuits, and is supported by the record. As Supreme Court Rule

10 indicates, a writ of *certiorari* is "rarely granted" to review such matters. It should not be issued here.

CONCLUSION

The Petitions for Writs of *Certiorari* should be granted as to Question One set out above and otherwise denied.

Respectfully submitted,

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Nos. 04-1528 and 04-1530

In The
Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT-INTERVENORS' BRIEF IN RESPONSE AND PARTIAL OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's limits on campaign contributions to candidates for office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch and Libertarian Party of Vermont: *Petitioners in 04-1528*;

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee – Fund for Independent Political Expenditures, Marcella Landell and Donald R. Brunelle: *Petitioners in No. 04-1530*;

William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530*;

Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey (deceased), Phil Hoff, Frank Huard, Karen Kitzmiller (deceased), Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters and Rural Vermont state that they have not issued shares to the public and that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

Respondent-Intervenors Vermont Public Interest Research Group, *et al.*, join in the Statement of the Case set forth in the brief of Respondents William H. Sorrell, *et al.*

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that Vermont's campaign expenditure limits may be upheld consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), in view of the compelling governmental interests the limits serve. Respondent-Intervenors nevertheless agree that this Court should grant review of this issue. The Courts of Appeals are divided on the question of whether *Buckley* erects a *per se* bar to expenditure limits, and the constitutionality of candidate expenditure limits is a question of exceptional national importance which this Court has not addressed in the nearly thirty years since *Buckley v. Valeo* – a period of immense change in campaign finance and its impact on governance and elections.

Vermont's experience demonstrates that limits on contributions alone, without limits on candidates' overall campaign expenditures, are inadequate to serve the state's compelling interest in deterring the reality and appearance of corruption. Under a system of unlimited campaign expenditures, officeholders faced with difficult choices about legislative issues must constantly weigh the possibility that an opponent will out-raise and out-spend them if they alienate an interest with deep financial pockets. Candidates therefore remain dependent on special interests that can generate large aggregate contributions for the campaign funding arms race, fueling the public's perception that legislative policy and access are for sale.

Buckley's regime of unlimited campaign spending also has created relentless pressure on officeholders to become

full-time fundraisers, interfering with their ability to carry out the duties for which they were elected. It has diminished robust public debate of the issues as incumbents build ever-larger war chests that deter competitors and leave many elections effectively uncontested.

In the wake of the Second Circuit's decision, spending limits legislation already is pending in at least three states. If this Court delays resolution of the division among the circuits on this issue, state and local governments will face intolerable uncertainty and confusion over the constitutionality of such reform measures. The prevailing uncertainty over the constitutionality of spending limits is heightened by the fact that members of this Court in recent years repeatedly have suggested that the Court may need to review *Buckley*'s treatment of spending limits. Without this Court's guidance, state and local governments will be forced to litigate the constitutionality of spending limits under unsettled and conflicting legal standards, burdening their resources and those of the judicial system. The Court should, therefore, grant the petitions with respect to the first question presented in each petition.

The Court should deny review of the remaining questions presented in the petitions, as none of them presents an issue warranting this Court's consideration. There is no division among the circuits concerning the constitutionality of limits on campaign contributions, an issue on which this Court provided clear guidance only five years ago in *Nixon v. Shrink Missouri Gov't PAC* ("*Shrink*"), 528 U.S. 377 (2000). Similarly, no circuit conflict exists concerning the constitutionality of Vermont's rebuttable presumption concerning coordination of political party and committee expenditures, and this narrow issue does not warrant the Court's review. Accordingly, the petitions should be denied as to those issues.

ARGUMENT

I. THE COURT SHOULD REVIEW THE CONSTITUTIONALITY OF VERMONT'S EXPENDITURE LIMITS BECAUSE THE CIRCUIT COURTS ARE DIVIDED ON A CONSTITUTIONAL ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

A. The Circuits Are Divided.

As petitioners note, the Second, Sixth and Tenth Circuits are divided on whether campaign spending limits may be upheld consistent with the First Amendment. The Second Circuit has ruled that campaign spending limits may be upheld if they are narrowly tailored to serve the state's compelling interest in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials," App. 144a,[1] while the Sixth and Tenth Circuits have ruled that *Buckley* precludes the constitutionality of campaign spending limits regardless of the facts and legal interests supporting them, *see Homans v. City of Albuquerque*, 366 F.3d 900, 914-21 (10th Cir.), *cert. denied*, 125 S.Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998).[2] *See also* App.113a (expressly noting circuit conflict).

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[1] "App." refers to the Randall Petitioners' Appendix; "Resp. App." refers to the Appendix of Respondent-Intervenors.

[2] Like the Second Circuit panel, the panels addressing this question in the Sixth and Tenth Circuits were themselves divided on the issue, underscoring the need for this Court's guidance. *See Kruse v. City of Cincinnati*, 142 F.3d at 920 (Cohn, J., concurring) (expressly disagreeing with panel majority's holding that *Buckley* categorically invalidates campaign expenditure limits); *Homans v. City of Albuquerque*, 366 F.3d at 908 (Lucero, J., concurring) ("*Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances.").

B. Delay in Resolving the Circuit Split Will Create Intolerable Uncertainty for State and Local Governments and the Federal Courts.

Even before the *Landell* ruling, state and local governments in three circuits had determined that unlimited campaign expenditures by candidates harm critical governmental interests in a manner not foreseen by the *Buckley* Court, and had sought to enforce mandatory limits on campaign expenditures as a means of redressing these harms.[3] The Second Circuit's ruling has only intensified the interest of state and local governments in establishing spending limits for their elections. In the wake of the Second Circuit's decision, legislation to impose limits on candidates' spending in state elections already is pending in Massachusetts, North Carolina and Oregon, and is about to be introduced in Wisconsin.[4] Given that

[3] Vermont enacted its reform legislation in 1997. In 1995 the Supreme Court of Ohio sought to protect its judicial elections from the corrosive effects of unlimited fundraising by amending its judicial code of ethics to set campaign expenditure limits for Ohio's judicial elections. *See Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (affirming grant of preliminary injunction against spending limit), *cert. denied*, 525 U.S. 1114 (1999). That same year the City of Cincinnati enacted spending limits for candidates seeking municipal office. Cincinnati Ordinance 240-1995 (struck down in *Kruse v. City of Cincinnati*). Albuquerque, New Mexico, sought to enforce mandatory expenditure limits for its municipal elections throughout the post-*Buckley* period, *see Homans v. City of Albuquerque*, 366 F.3d 900. In addition, members of Congress have introduced campaign spending limit bills at least fifteen times since this Court's ruling in *Buckley*. *See* S. 1502, 106th Cong. (1999); H.R. 3851, 105th Cong. (1998); S. 1057, H.R. 77, H.R. 243, H.R. 1366, 105th Cong. (1997); H.R. 3651 and H.R. 3658, 104th Cong. (1996); H.R. 3571 and H.Res. 168, 103rd Cong. (1993); H.R. 1456, 101st Cong. (1989); H.R. 2473, 100th Cong. (1987); S. 59, 99th Cong. (1985); S. 1684 and S. 1185, 98th Cong. (1983).

[4] *See* H.B. 118, 184th Gen. Ct. (Mass. 2005) (*available at* http://www.mass.gov/legis/bills/house/ht00/ht00118.htm) (proposing limits on

(Continued on following page)

over thirty states had laws limiting campaign spending prior to *Buckley*, *see Developments in the Law – Regulation of Political Campaigns*, 88 Harv. L. Rev. 1233, 1254-55 & n.121 (1975), it is highly likely that additional jurisdictions will propose and enact spending limits legislation in response to the Second Circuit's decision.

In light of the strong interest of state and local governments in enacting spending limits legislation, and the irreconcilable conflict among the circuits on this issue, this Court should not deny review to await developments on the remand ordered by the Second Circuit. The lengthy period of delay that would result before resolution of the circuit conflict would impose severe burdens on state and local governments considering campaign finance reform proposals or facing litigation over such proposals. Jurisdictions will be forced to litigate this critical constitutional issue without knowing whether to follow the analysis of the Second Circuit, which contemplates a detailed evidentiary examination of the justifications for spending limits

campaign expenditures for all general, special, and primary elections for state office, ranging from $54,000 for candidates for the office of state representative to $3 million for candidates for the office of governor); H.B. 1533, Gen. Assem., 2005-2006 Sess. (N.C. 2005) (*available at* http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1533v0.html (proposing to limit campaign expenditures to no more than 75% of the median amount spent by candidates in the last two comparable elections for the same office, *see id.* at § 2); H.B. 3270, 73rd Or. Legis. Assem., Reg. Sess. (Or. 2005) (*available at* http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro.html) (proposing to limit candidates' contributions to their own campaigns: candidates for statewide office would be limited to contributing no more than $50,000, and candidates for other offices would be limited to contributing no more than $10,000, of their own funds to their campaigns, *id.* at § 9). In Wisconsin, a legislator has requested preparation of a bill limiting candidate spending in state elections. Letter dated June 7, 2005 from Representative Joseph Parisi to Jay Hecht, Executive Director of Wisconsin Common Cause. Resp. App. 1a.

and their degree of tailoring, or that of the Sixth and Tenth Circuits, which renders spending limits automatically unconstitutional regardless of the facts and legal interests asserted.

The prevailing uncertainty over the constitutional analysis applicable to spending limits is heightened by the fact that several members of this Court in recent years have suggested that the Court may need to review *Buckley*'s treatment of campaign expenditures.[5] The emergence of a circuit conflict on this issue now makes the Court's guidance imperative to forestall wasteful litigation that otherwise will burden state and local governments and the judicial system.

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[5] *See Shrink*, 528 U.S. at 403-04 (Breyer, J., joined by Ginsburg, J., concurring) (calling for an approach that balances competing constitutional interests and suggesting that courts "should defer to [a legislature's] political judgment that unlimited spending threatens the integrity of the electoral process"); *id.* at 398 (Stevens, J., concurring) ("Money is property; it is not speech."); *id.* at 409 (Kennedy, J., dissenting) (noting the difficulty of constitutional issues surrounding campaign regulation but stating: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 649-50 (1996) ("*Colorado Republican II*") (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment."). *Cf. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit *Buckley*'s general approach to expenditure limits, "some have argued that such limits could be justified in light of post-*Buckley* developments in campaign finance").

Moreover, a remand to the district court is unlikely to eliminate the circuit conflict or significantly benefit this Court's eventual consideration of the issue. Even if the district court or court of appeals were eventually to hold that Vermont's particular limits are insufficiently narrowly tailored, the Second Circuit's holding that appropriately tailored spending limits may be upheld under the First Amendment would stand. The conflict with the Sixth and Tenth Circuits therefore would remain. Accordingly, a grant of certiorari on this issue should not await the remand ordered by the Second Circuit.

C. The Issue Is of Exceptional Importance.

Petitioners are correct that the importance of the constitutional issue is beyond dispute, but their account of the issue's significance is incomplete. When courts confront a legislative enactment regulating the role of money in the political process, "constitutionally protected interests lie on both sides of the legal equation." *Shrink*, 528 U.S. at 400 (Breyer, J., concurring).

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection."

McConnell v. Federal Election Comm'n, 540 U.S. 93, 223-24 (2003) (*quoting Burroughs v. United States*, 290 U.S. 534, 545 (1934)). The view that *Buckley* automatically invalidates spending limits endangers the ability of Congress, states and municipalities to respond to serious threats to their democratic processes. The Court should grant review to affirm that the Second Circuit correctly rejected this rigid view of *Buckley*.

1. Contribution Limits Alone Have Proven Insufficient to Deter Corruption and Its Appearance.

Buckley and subsequent decisions of this Court have recognized the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption and undue influence. *McConnell,* 540 U.S. at 143-54; *Buckley*, 424 U.S. at 26-27. The *Buckley* Court, however, predicted that contribution limits alone would be sufficient to deter the appearance and reality of corruption, even if spending remained unlimited. 424 U.S. at 55-56. *Buckley*'s judgment was necessarily a predictive one, because neither campaign contributions *nor* spending in congressional campaigns were subject to meaningful limitations prior to enactment of the limits reviewed in *Buckley*.

The record here demonstrates that, in the nearly thirty years since *Buckley*, the Court's prediction about contribution limits has proven wrong. App. 128a-135a & n. 13. In the years following *Buckley,* Vermont elections, like those at the federal level, have been conducted with limits on contributions but no limits on spending. Vermont's experience demonstrates that, when candidates face an unlimited need for campaign funds, limits on contributions by a particular individual or political committee do not address the concentrated financial power that well-funded interests can exert. Under a system of unlimited campaign expenditures, officeholders faced with difficult choices about legislative issues must always weigh the possibility that an opponent will out-raise and out-spend them if they alienate an interest with deep financial pockets. Each dollar is irreplaceable because it may be necessary to assure parity with, or an advantage over, an opponent.

Candidates' unlimited need for funds therefore makes them particularly dependent on special interests that can

generate the largest aggregate contributions. As the Second Circuit found:

> [B]ecause of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds. . . . If legislation alienates one major special interest group, officials are reluctant to alienate others because the number of entities and people making political contributions is finite and small. App. 131a.

This concern is anything but abstract. A Vermont senator who sponsored a bill concerning the labeling of genetically engineered food testified that she could not get support from senate leadership because the pharmaceutical industry was already withholding campaign donations based on the party's legislative proposals. The senate president told her, "We've already lost the drug money, and I don't need to lose the food manufacture[r] money too. So I'm not going to sign the bill." App. 131a (citing testimony of Senator Cheryl Rivers). A former Republican Lieutenant Governor of Vermont said, "You have to initially consider it as whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election," Tr. VIII-26 (Peter Smith),[6] and acknowledged weighing that concern in casting a tie-breaking vote on legislation affecting industry contributors. *Id.* at Tr. VIII-39-41. Another senator acknowledged

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[6] In this brief, "Tr." refers to the trial court transcript, which was filed in full as part of the record before the Second Circuit; "Exh." refers to trial exhibit volumes also filed as part of the record below.

that, because of the influence of money, "there is an agenda out there that is pretty much set by folks that are not elected." App. 132a (quoting testimony of Senator Elizabeth Ready).

As the Second Circuit found, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns." App. 134a. *See also* App. 133a (noting that "'bundling' smaller contributions from a particular company or industry" is one practice through which concentrated financial interests leverage their influence with elected officials despite contribution limits).[7]

Spending limits alter this dynamic. When a candidate knows the upper limit of funds that will be necessary for a campaign, the pressure to court a particular special interest based on its financial clout is reduced, since each additional dollar no longer is irreplaceable. Candidates will no longer be locked into "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII-57 (Peter Smith).

[7] An officeholder's calculation of legislative policy based on financial support is not merely a benign example of legislative responsiveness to supporters generally. "[S]uch influence of campaign contributors is pernicious because it is bought. . . . Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it." App. 134a.

2. States Have a Compelling Interest in Preserving the Time of Officeholders and Candidates.

Vermont's spending limits serve the state's compelling interest in preserving the time of officeholders and candidates from the demands of fundraising, so that they may better perform their duties as representatives. The Court should grant review to affirm that *Buckley* does not bar states from addressing this critical interest through limits on campaign spending.

As the court below found, "unlimited [campaign] expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests," App. 139a, and "financial necessity requires that elected officials spend time with donors rather than on their official duties." App. 142a.

> [T]he evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time. Special interests, well placed to take advantage of candidates' fear of losing this fundraising war, dominate candidates' time and thereby have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly consuming the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions. App. 140a.

The Second Circuit correctly determined that *Buckley* did not foreclose consideration of the compelling governmental interest in candidate time-preservation as a basis for spending limits. App. 138a-139a. *Cf. Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state

legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."); *Homans v. City of Albuquerque*, 366 F.3d at 911 (Lucero, J., concurring) (*Buckley* did not address the "wholly separate" interest in preserving officeholders' time.); *Kruse v. City of Cincinnati*, 142 F.3d at 920 (Cohn, J., concurring) ("It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties . . . is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.").[8]

The interest in preserving the time of elected officials and candidates clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. App. 138a-139a. The former is based not on an arbitrary view of how much spending is "too much," but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1283 (1994). *See also* Richard Briffault, Nixon v. Shrink Missouri Government PAC: *The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1769-70 (2001).

[8] Petitioners argue that *Buckley* implicitly rejected the officeholder time-protection rationale as a compelling governmental interest. But the Court's careful description in *Buckley* of the governmental interests proffered in support of campaign spending limits, 424 U.S. at 55-57, makes no mention of the time-preservation interest, and the Court's opinion cannot fairly be read to have ruled upon it. *See* App. 138a-139a.

3. Alternative Grounds for Affirming the Second Circuit's Ruling Present Equally Important Issues for This Court's Consideration.

Granting review of Vermont's expenditure limits will allow the Court to address additional important issues that present alternative grounds for affirming the Second Circuit's decision. *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (court may affirm on any ground that law and record permit that does not expand relief granted below).

a. The Critical Interest Served by Electoral Competition Deserves Consideration as a Basis for Spending Limits.

A robust public debate of the issues in an election is impossible in the absence of electoral competition among candidates. Under a system of unlimited campaign spending, candidates build campaign war chests with the specific purpose of deterring challengers from coming forward. Unlimited campaign spending, by undermining the very conditions needed to promote a debate that is "uninhibited, robust, and wide-open,"[9] thus threatens, rather than promotes, First Amendment values.

The implications for democratic governance are deeply disturbing. As an expert report in this case points out:

> Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a

[9] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

> democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable.
>
> Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose[] a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Exh. Vol. III at E-1044-45 (report of Dr. Donald Gross).

Petitioners, through the emphasis they place on the claim that spending limits harm challengers, implicitly confirm the importance of competitive elections for a functioning democracy. Indeed, Judge Winter's dissent presents the supposed "incumbent protection" resulting from spending limits as perhaps the central issue at stake in the constitutional calculus. App. 245a-250a. Respondent-Intervenors agree that this case presents an excellent vehicle through which this Court may address the critical issue of how unlimited campaign spending affects electoral competition. The factual record, however, belies the uncritical assumption that unlimited campaign spending is a boon to challengers.

Vermont has conducted its elections without limits on campaign spending since 1976. Nevertheless, during the nine election cycles prior to the enactment of Act 64, only one incumbent lost a campaign for any statewide office. For the office of State Treasurer, the incumbent had no major opposition in five of the previous nine races; for Secretary of State, the incumbent had no major challenger in four of the previous nine races; for Attorney General, the incumbent had no major challenger in six of the previous nine campaigns. Exh. Vol. V at E-1692-94.

In elections for Congress, campaign expenditures also have remained unlimited since 1976. Congressional

incumbents nevertheless have consistently enjoyed re-election rates of over 90%. Exh. Vol. III at E-1046 (expert report of Dr. Donald Gross). In 2002, 98% of House incumbents won re-election.[10] Challengers for a House seat raised $192,945 on average in 2004, while House incumbents raised an average of $1,122,385.[11]

Put simply, unlimited campaign spending cannot help a challenger unless he or she is able to raise and spend more money than the incumbent. This scenario is relatively rare. Incumbents generally have an easier time raising money for their races than challengers because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III-212 (Dr. John Lott); Tr. X-80 (Dr. Donald Gross); Tr. IX-231-32 (Anthony Pollina). Indeed, in the three election cycles prior to the enactment of Act 64, the only gubernatorial candidate to spend in excess of Act 64's expenditure limits was incumbent Governor Howard Dean, in his 1998 race. Exh. Vol. III at E-0987-89; *see also* App. 42a-44a.

More typically, the many advantages enjoyed by incumbents – including their greater name-recognition, greater exposure to the public through news coverage of their activities, and even, as cited by Judge Winter, the use of state government websites to display their photos and accomplishments in office, App. 214a-216a & n.8 – are simply compounded by the incumbents' ability to outspend the challengers. Even Petitioners' witnesses confirmed that the worst-case scenario for a challenger is when an incumbent's built-in advantages are combined with the

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[10] Center for Responsive Politics, *2004 Election Overview, Incumbent Advantage-All Candidates* (*available at* http://opensecrets.org/overview/incumbs.asp?cycle=2004).

[11] *Id.*

ability to outspend the challenger. *See, e.g.* Tr. I-210 (Patrick Garahan).[12]

Research further demonstrates that, for challengers to be competitive, the important factor is not the absolute level of their spending, but the ratio between their spending and that of the incumbent. Examination of legislative races in numerous states shows that challengers can be competitive if they are able to spend at least 50% of what the incumbent spends. Exh. Vol. III at E-1048 (Gross report). Act 64 actually goes further and guarantees that any challenger who is able to raise the full amount permitted by the limits will be able to outspend the incumbent, because the spending limits applicable to incumbents are lower than those applicable to challengers. App. 7a.[13] The pro-competitive impact of this system is confirmed by one

[12] *See also* Exh. Vol. VIII at E-3076-77 (petitioners' witness Kurt Wright testifying that spending limits would have benefited his effort to defeat incumbent in Burlington mayoral race); Tr. I-68-70 (petitioners' witness Peter Snelling testifying that challengers are typically underfunded, so spending limits may help challengers.)

[13] Any candidate who is unable to raise the full amount permitted by the spending limit obviously is not harmed by the limit. Indeed, some of the petitioners in this case were badly outspent by the incumbents they challenged, and had never been able to raise sums for their campaigns as large as those permitted by the limits they are challenging. *See* Tr. II-32, 34 (Vermont Libertarian Party chair Scott Berkey raised only $100 for his 1998 state senate campaign, while his incumbent opponent spent $13,663.); Exh. Vol. V at E-1755 (petitioner Donald Brunelle raised only $436 in his race against an incumbent for a Vermont House seat in 1994.) *See also* Tr. III-19-21 (as candidate for Vermont House in 1992, 1994, and 1998, petitioner George Kuusela never raised more than $1,550; spending limit under Act 64 would be $3,000.). Notably, Senate incumbents in Vermont spent more money than challengers in each of the three election cycles that were studied. Exh. Vol. III at E-0990. In the Vermont House, while challengers on average spent slightly more than incumbents, both challengers and incumbents spent less than the Act 64 limits would allow, and the limits therefore would not impede House challengers. *Id.* at E-0991.

of Petitioners' expert witnesses, whose research indicates that imposing lower spending limits on incumbents than on challengers would make campaigns more competitive. Tr. III-217-19 (Dr. John Lott).

Respondent-Intervenors acknowledge that *Buckley*'s analysis often is read to reject the governmental interest in competitive elections as a basis for campaign spending limits. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."). *But see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. at 402 (Breyer, J., concurring) (discussing this passage from *Buckley* but noting that "those words cannot be taken literally"); *Homans v. City of Albuquerque*, 366 F.3d at 913 (Lucero, J., concurring) ("[N]othing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits.") Given the importance of electoral competition for a functioning democracy, and the strong evidence that unlimited campaign spending, by deterring electoral competition, undermines the very conditions necessary for a robust public debate of the issues, *Buckley*'s holding should be revisited to the extent necessary to permit consideration of this critical governmental interest as an alternative basis to uphold the Second Circuit's judgment.

b. The Broader Governmental Interest in Political Equality Among Citizens Also Deserves Consideration as a Basis for Spending Limits.

Even if unlimited campaign spending did not serve to entrench incumbents, states should be free to weigh the fundamental value of political equality among citizens as a justification for spending limits. By too readily assuming

that the expenditure of money on a campaign deserves the same protection as political speech itself, the *Buckley* Court has made the political marketplace the special province of the winners in the economic marketplace. Given the vast inequalities of wealth in this nation, this outcome is antithetical to democratic ideals. *Cf. Nixon*, 528 U.S. at 401 (Breyer, J., concurring) (recognizing an important constitutional interest in restrictions that "aim to democratize the influence that money itself may bring to bear upon the electoral process"); *Landell v. Sorrell*, No. 00-9159(L) at 14 (2d Cir. May 11, 2005) (Calabresi, J., concurring in denial of rehearing en banc) (urging that reconsideration of *Buckley* is "essential" on this and other grounds).

The growing importance of personal wealth in determining who may hold elected office impoverishes our democracy because the capacity for leadership in public service is not confined to those with limitless access to wealth. It is no accident that some 43% of the newly elected members Congress in 2002 had net worths of over one million dollars, compared to only 1% of the U.S. population. Jonathan D. Salant, *Nearly half of congressional freshmen are millionaires*, Detroit News, Dec. 25, 2002 (*available at* http://www.detnews.com/2002/politics/0212/27/politics-44180.htm).

As the record in this case shows, a regime of unlimited campaign spending makes great personal wealth a primary factor not only in determining who can run for office, but also in determining who has access to officeholders after the election. *See* App. 134a. A candidate's greater responsiveness to wealthy interests that can generate the largest aggregate contributions, at the expense of non-contributors, is offensive to democracy when so many

citizens lack the means to make even minimal financial contributions to campaigns.[14]

The Court should revisit and, if necessary, reverse *Buckley* to the extent it precludes state legislatures from balancing the interest in protecting the fundamental right to equal political access and participation against a candidate's interest in unfettered campaign spending.

c. The Court Should Review the Standard of Scrutiny Applicable to Vermont's Expenditure Limits.

Vermont's expenditure limits are fully constitutional under the exacting scrutiny required by *Buckley* and applied by the court below. If the Court grants review, it nevertheless should revisit the appropriate standard of scrutiny applicable to candidate expenditure limits, as an alternative basis to uphold the Second Circuit's judgment.

Where, as here, important competing constitutional interests are implicated by legislation, the Court should carefully balance the interests rather than apply a presumption of unconstitutionality. *See Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., joined by O'Connor, J., concurring); *Shrink,* 528 U.S. at 401-03 (Breyer, J., joined by Ginsburg, J., concurring).

> [I]n practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less

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[14] The median Vermont household income was $32,358 in 1996, and 12.6% of the Vermont population had income below the poverty line. Exh. Vol. V at E-1740. Only 370 individuals made contributions of over $400 to candidates for statewide office in Vermont in 1998. Exh. Vol. III at E-0980.

> restrictive alternative). Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments – at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.

Shrink, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring); *see also Bartnicki*, 532 U.S. at 536 (Breyer, J., joined by O'Connor, J., concurring) ("I would ask whether the statutes strike a reasonable balance between [the competing interests]."); *Hill v. Colorado*, 530 U.S. 703, 714-18, 727 (2000) (according deference to legislature after balancing interests).

Here, there are several constitutional interests that the Court should weigh against the First Amendment interests of candidates. These include the interests in "protect[ing] the integrity of the electoral process – the means through with a free society democratically translates political speech into concrete governmental action," *Shrink*, 528 U.S. at 401 (Breyer, J., concurring)), and in "democratiz[ing] the influence that money itself may bring to bear upon the electoral process," *id. See also supra* Part I.C. (discussing Vermont's interests).[15]

As Justice Breyer has noted, the *Buckley* framework may be sufficiently flexible to comprehend this mode of scrutiny for campaign finance legislation. *Shrink*, 528 U.S.

[15] The Vermont legislature specifically found that Act 64's provisions were necessary to implement more fully Article 8 of Chapter I of the Vermont Constitution, which declares: "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." App. 35a.

at 403-05 (Breyer, J., joined by Ginsburg, J., concurring). If not, *Buckley* should, to that extent, be reconsidered.

Buckley's determination that spending limits require the most exacting First Amendment scrutiny rested in part on the assumption that a restraint on spending is indistinguishable from a restraint on speech itself. *See Buckley*, 424 U.S. at 19. The realities of campaign spending revealed by the record here, however, undermine that conclusion. For example, the research of Petitioners' expert, Dr. John Lott, found that increasing campaign expenditures in state and federal elections in recent years are *not* the result of an increase in the cost of getting the candidate's message out to voters, but instead are a function of the growing size of government. Tr. III-206-07. As Dr. Lott's report for this case characterized it, "*The more favors the government has to give out, the more resources that people will spend to obtain those favors.*" Exh. Vol. VI at E-2202 (emphasis added); *see also id.* at E-2264 (characterizing as a "myth" the contention that increased costs of television advertising account for increased campaign expenditures). When campaign spending is a function not of increased communication and debate, but of special interests' determination to secure favorable governmental policies, the justification for treating spending limits as a direct restraint on speech is greatly weakened.

The *Buckley* Court also assumed that, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." *Buckley*, 424 U.S. at 56. The record here shows, however, that a candidate's level of financial support often is far more dependent on the financial clout of industries with a legislative agenda than on the candidate's support from his or her voting constituency. *See, e.g.*, Exh. Vol. III at E-0783 (Bryan

Pfeiffer, "He's a Lock, But Funds Still Roll Right In," *Rutland Herald*, Oct. 2, 1996 (reporting how several executives of a Norfolk, Virginia, health care corporation, and their families, bundled large contributions to Governor Dean)).[16] Petitioner Steve Howard had fewer contributors when running as an incumbent in his 1996 House campaign than when running as a challenger in his 1992 race, yet raised nearly twice as much money in 1996. Exh. Vol. IV at E-1467-85, E-1491-1501.

In short, fundraising is no bellwether of the size and intensity of a candidate's support. *Cf. Landell v. Sorrell*, No. 00-9159(L) at 5 (Calabresi, J., concurring in denial of rehearing en banc) ("[G]iven the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person.").

Both courts below have found that Vermont's spending limits are set at a level that fully permits candidates to communicate their ideas and messages to the voters and run effective campaigns. App. 42a-44a; App. 152a-157a. Accordingly, and in view of the critical interests served by Vermont's spending limits, they should not be subject to an inflexible presumption of unconstitutionality. *See Shrink*, 528 U.S. at 403-04 (Breyer, J., concurring) ("We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process.").

[16] In the 1994 gubernatorial race, Howard Dean raised more money just from health industry interests than his opponent, David Kelley, raised for his whole campaign. As one witness who testified before the legislature put it, "David Kelley was not only outspent by Howard Dean, [he] was actually outspent simply by the health care industry." Exh. Vol. I at E-0213, Exh. Vol. V at E-1706.

Alternatively, the Court should determine whether Vermont's candidate spending limits may be upheld as a content-neutral regulation of speech. A content-neutral law is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Although the *Buckley* Court never explicitly determined whether spending limits were content-based, it applied exacting scrutiny, the standard applicable to content-based restrictions.[17] *See Buckley*, 424 U.S. at 17-18 (declining to view congressional spending limits as restrictions on conduct or as time, manner and place regulations, and rejecting application of *United States v. O'Brien*, 391 U.S. 367 (1968), and *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

This Court's First Amendment jurisprudence as it has developed since *Buckley*, however, supports a determination that candidate spending limits are content-neutral, and the Court should reconsider this issue.

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that

[17] Subsequent cases have not fully resolved whether campaign expenditure limits are content-based under the *Ward* analysis. *Compare Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in the judgment) (describing *Buckley*, in part, as "striking down content-neutral limitations on financial expenditures"), *with Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 657-58 (1994) (characterizing independent expenditure limitations in *Buckley* as content-based to the extent they were justified on equalization grounds).

> serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech . . . ."

Ward, 491 U.S. at 791 (internal citations omitted); *see also Simon & Schuster*, 502 U.S. at 122 n.* ("[S]tatutes [are] content neutral where they [are] intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others."); *Boos v. Barry*, 485 U.S. 312, 320 (1988) (O'Connor, Stevens, Scalia, JJ., plurality opinion) ("[C]ontent-neutral speech restrictions [are] those that are justified without reference to the content of the regulated speech.") (internal quotations and citations omitted).[18]

The expenditure limitations at issue here meet this standard for content-neutrality. They were not adopted because of disagreement with the message conveyed by political candidates; indeed, they are viewpoint-neutral in applying to all candidates. The government's purpose in enacting the limits relates not to the content of candidates' speech but rather to (1) avoiding corruption and the appearance thereof, *see* App. 134a, and (2) preserving the time of officeholders and candidates, *see* App. 140a. The Second Circuit confirmed the content-neutrality of Vermont's

[18] *Ward* makes clear that the test of intermediate scrutiny applies regardless of the specific First Amendment content-neutral doctrine at issue. *See Ward*, 491 U.S. at 791 (outlining "principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular"); *id.* at 797-98 (noting that *O'Brien* analysis "is little, if any, different from the standard applied to time, place, or manner restrictions"); *id.* at 791 (incorporating test of content-neutrality derived from *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

limits when it stated, "The significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather *in eliminating this potential of being vastly outspent that leads to the 'arms race' mentality among candidates and elected officials*." App. 149a (emphasis added).

Alternatively, expenditure limits should not be subject to a presumption of unconstitutionality because money is property, not speech. *See Shrink*, 528 U.S. at 398 (Stevens, J., concurring); *see also* Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 Vand. L. Rev. 1235 (2000).

Finally, even if the Court applies exacting scrutiny, the Second Circuit's application of that standard represents a departure from this Court's precedents. The exacting scrutiny applied in First Amendment cases such as *Burson v. Freeman*, 504 U.S. 191 (1992), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), is satisfied by the record here. Because the spending caps were set so as to allow ample communication and effective campaigning, *see* App. 152a-157a, the statute is "precisely targeted to eliminate" the problems that the statute sought to address without inhibiting political discussion and debate. *See Austin*, 494 U.S. at 660. Under these circumstances, an increase in the limit would be "a difference only in degree, not a less restrictive alternative in kind." *See Burson*, 504 U.S. at 210 (plurality opinion) (holding that prohibition on electioneering within 100 feet of polling place satisfied exacting scrutiny without a showing that the 100-foot boundary was "perfectly tailored").[19]

[19] To the extent a "least restrictive alternative" standard is applicable, the alternatives suggested by the Second Circuit are not required by this Court's precedents. To be effective, a less restrictive

(Continued on following page)

II. The Court Should Deny Review of Act 64's Presumption Concerning "Related Expenditures."[20]

17 V.S.A. § 2809(c) defines related expenditures as those "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee," App. 8a, and § 2809(d) creates a rebuttable evidentiary presumption that an expenditure by a political party or political committee that benefits six or fewer candidates is a "related expenditure." Only § 2809(d) is challenged by Petitioners in this Court.[21]

The Second Circuit's decision upheld § 2809(d) insofar as it treats related expenditures as contributions to candidates,[22] but that decision is not in conflict with any

alternative must be both plausible and feasible. *Ashcroft v. ACLU*, 124 S.Ct. 2783, 2792 (2004); *United States v. Playboy Entm't Group*, 529 U.S. 803, 815-16 (2000). Almost by definition, a voluntary system of expenditure limits with public financing is not an effective alternative, because in any given election the compelling governmental interests served by spending limits can be thwarted by any candidate who chooses to decline the public funding. Further, once a court has found that a particular limit will allow ample communication and fully effective campaigns, a state should not be required to make the inherently impossible showing that a limit even one dollar higher would not be equally feasible in serving the state's interests. Such a test would be no different from declaring a spending limit inherently unconstitutional.

[20] Respondent-Intervenors join in the arguments presented by Respondents William H. Sorrell, *et al.*, explaining why the Court should deny review as to Act 64's contribution limits.

[21] The Vermont Republican State Committee ("VRSC") Petitioners challenged the definition of "related expenditure" in 17 V.S.A. § 2809(c) as overbroad in the court below, but have abandoned that claim in their petition to this Court, challenging only the presumption set forth in § 2809(d). The Randall Petitioners did not challenge the definition of "related expenditure" in the court below, but challenged only the presumption set forth in § 2809(d).

[22] Neither the district court nor the Second Circuit has yet ruled on whether the presumption in § 2809(d) is constitutional insofar as it

(Continued on following page)

other circuit decision and does not present an issue warranting review. The VRSC Petitioners argue that the Second Circuit's decision fails to recognize that coordination requires some element of control, cooperation or prearrangement with the candidate, placing the Second Circuit in alleged conflict with decisions of the Eighth and First Circuits. That argument simply ignores the Second Circuit's holding, which states:

> [W]e construe the phrase "facilitated by" [in § 2809(c)] as requiring some "prearrangement" or "coordination" with the candidate. Under such a construction, sharing routine information about a candidate is not sufficient to meet the "facilitated by" requirement. App. 183a (citation omitted).[23]

would treat a related expenditure as an *expenditure by* the candidate. The district court never reached that issue because it was mooted by the district court's initial ruling striking down the expenditure limits. *See* App. 85a. On appeal, the Second Circuit upheld the presumption *only* to the extent it affects the related expenditures that are treated as contributions to candidates. It expressly reserved judgment on whether the provision was constitutional to the extent it treated a related expenditure as an expenditure by the candidate, remanding that issue for initial determination by the district court. *See* App. 168a. Because neither court below has ever addressed the constitutionality of the presumption as it applies to expenditures, that question is not ripe for this Court's review, and the Court should decline to review it. The VRSC Petitioners appear to acknowledge this, as Question 3 of their petition asks the Court to address the constitutionality of the presumption as it affects a related expenditure "subject to contribution limits." *See also* Petition at 27 (challenging provision treating covered expenditures as "subject to contribution limits to each candidate"). The Randall Petitioners, however, purport to challenge the provision as it applies both to contributions and expenditures, *see* Question 3.

[23] The Second Circuit focused on the proper interpretation of the phrase "facilitated by" because that was the only element of the definition in § 2809(c) which the Petitioners challenged as overbroad. *See* App. 182a-183a. The other portions of the definition – "solicited by"

(Continued on following page)

The VRSC Petitioners' real argument, then, is that any use of an evidentiary presumption that a particular expenditure is "related," whether or not the presumption is fully rebuttable, violates the First Amendment. Petitioners cite no case supporting such an argument, and Respondent-Intervenors are aware of none.

Nor is there any conflict with this Court's decisions in *Buckley*, *McConnell*, or *Colorado Republican II*. *Buckley* simply upheld a federal provision treating coordinated expenditures as contributions to candidates, 424 U.S. at 46-47, and *McConnell* specifically *rejected* the argument that a definition of "coordination" is overbroad and unconstitutionally vague if it permits a finding of coordination in the absence of an agreement between the candidate and the party making the expenditure, 540 U.S. at 219-22. Neither case addressed or invalidated a rebuttable presumption of coordination. *Colorado Republican II*, moreover, addressed a "conclusive presumption" of coordination, not a fully rebuttable presumption. 518 U.S. at 619.

The Randall Petitioners take a different tack, arguing that the Second Circuit's decision conflicts with *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), because the rebuttable presumption of § 2809(d) purportedly creates a more severe burden on candidates, political parties and political committees than the regulation struck down in *Iowa Right to Life*. The statute at issue in *Iowa Right to Life*, however, is very different from the statute at issue here, and far more burdensome. The Iowa provision required candidates to monitor the financial disclosure statements of third parties and to file a "statement of disavowal" and take "corrective action" within seventy-two hours of each disclosure of an independent

---

and "approved by" – self-evidently require cooperation or prearrangement with the candidate.

expenditure by a third party, failing which the expenditure would be treated as an expenditure by the candidate. *Id.* at 966. The Court concluded that compelling a candidate to take such actions and make such statements burdened First Amendment rights because, among other things, such disavowals sent the implicit message that the candidate disagreed with the substance of the independent expenditure. *Id.* at 967 (disavowing an expenditure "has a strong negative connotation").

By contrast, 17 V.S.A. § 2809(d) places no burden on a candidate to take any particular action in response to an independent expenditure. It merely creates an evidentiary presumption that comes into play if, and only if, an enforcement proceeding is initiated or an opponent files a court action to have an expenditure declared a related expenditure. The presumption does not require a candidate or party to affirmatively repudiate an independent expenditure as a condition of treating it as independent. Nor does it require a candidate or party to report an expenditure as a "related expenditure," even if it falls under the terms of the presumption, so long as the expenditure was in fact independent (a matter which the candidate and political party or committee will know and about which either could testify, if necessary).

Indeed, the argument that the presumption will operate unconstitutionally by preventing political parties or committees from making truly independent expenditures is wholly speculative and unsupported by record evidence. Political parties and committees are sophisticated players within the political system, and are fully able to adapt to the minimal burden of an evidentiary presumption that is fully rebuttable. *Cf. McConnell*, 540 U.S. at 173 (rejecting facial challenge to provisions restricting soft-money contributions to state and local political parties and observing that political parties have

proven "extraordinarily flexible in adapting to new restrictions").

CONCLUSION

The petitions for writs of certiorari should be granted as to Question 1 in the petitions. The petitions should otherwise be denied.

June 15, 2005

Respectfully submitted,

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[LOGO]

STATE REPRESENTATIVE
JOSEPH PARISI

WISCONSIN STATE ASSEMBLY — 48th DISTRICT

June 7, 2005

Jay Hecht, Executive Director
Common Cause of WI
P.O. Box 2597
Madison, WI 53701

Dear Mr. Hecht:

Thank you for your inquiry to my office regarding disbursement limits for Assembly and Senate candidates. On May 12, 2005, I asked the Legislative Reference Bureau to draft legislation providing mandatory disbursement limits. The legislation will set a spending limit of $100,000 for Senate general elections and $50,000 for Assembly general elections.

As you know, the Legislature is in the middle of the budget process, so getting a bill out of drafting before the budget is over seems unlikely. Hopefully, something should be available in July.

Again, thanks for your interest in this bill draft. Please feel free to contact me if you have other questions about the proposal.

Sincerely,

/s/ Joe Parisi
JOE PARISI
State Representative
48th Assembly District

Supreme Court, U.S.
FILED
JUN 14 2005
OFFICE OF THE CLERK

Nos. 04-1528 and 04-1530

In The Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

v.

WILLIAM H. SORRELL, et al.,

Respondents.

VERMONT REPUBLICAN STATE COMMITEE, et al.,

Petitioners,

v.

WILLIAM H. SORRELL, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF SENATORS BILL BRADLEY AND ALAN SIMPSON IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici former Senators Bill Bradley and Alan Simpson urge the Court to grant the petition for a writ of certiorari. This case addresses a constitutional question of great magnitude concerning the application of this Court's First Amendment jurisprudence in the context of campaign finance reform.[1] The issue presented herein is whether the State of Vermont's campaign expenditure limits are justified by a compelling government interest.

Bill Bradley is a former United States Senator, and a Democrat from New Jersey. He was first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997. In addition, Senator Bradley ran for the Democratic Party nomination for President of the United States in the 2000 election cycle.

Alan Simpson is a former United States Senator, and a Republican from Wyoming. He was also first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997.

Having served the nation in the United States Senate, *amici* swore an oath to "support and defend the Constitution of the United States" and to "well and faithfully discharge the[ir] duties."[2] In addition to their service in the

---

[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

Senate, *amici* have raised millions of dollars for their campaigns, for their respective parties, and for other candidates. *Amici* are proud of their service in the legislative branch; however, as former members of a coordinate branch, they feel compelled to advise the Court of their utmost concern for the problem presented. With a sense of continuing obligation to serve to the nation, *amici* file this brief in support of the Respondents-Conditional Cross Petitioners and the Respondent-Intervenors-Conditional Cross Petitioners.

SUMMARY OF THE ARGUMENT

This case raises the question whether the immense time commitment of fundraising detracts excessively from the effective performance of duty by elected officials. *Amici* posit that due to the demands of fundraising, it is difficult for elected officials to fulfill their duties, and that the Constitution therefore permits government to place limits on campaign expenditures. For this reason, the Court should grant this petition for certiorari to address the constitutionality of the State of Vermont's campaign expenditure limits. The instant case provides the Court with an opportunity to consider issues central to the integrity of our system of representative democracy, as States and localities across the nation seek to address the impact of fundraising on campaigns and on officials' performance in elected office.

The petition for a writ of certiorari should be granted because there is a compelling government interest in protecting the time of elected officials from the excessive demands of fundraising. Without limits on campaign expenditures, campaign costs have escalated and fundraising has become an inordinately time-consuming job for

candidates and office holders fearful of being out-matched by their opponents' spending. As a result, the ability of elected officials to perform their duties has diminished, the quality of representation has declined, and the integrity of elected office has been undermined. Preserving the time of elected officials from the burdens of constant fundraising presents a compelling interest supporting campaign expenditure limits, an interest which was not before the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

REASONS FOR GRANTING THE WRIT

I. THE SPIRALING COSTS OF CAMPAIGNS TAKES ELECTED OFFICIALS AWAY FROM THEIR SWORN DUTIES.

A. In the Absence of Spending Limits, Campaign Costs in Federal, State and Local Elections Have Escalated.

In the 28 years since the Court decided *Buckley v. Valeo*, the costs of running a successful campaign for local, state or national office have rapidly escalated. In 1978, *Amicus* Senator Bradley spent $1,688,499 in his campaign for a United States Senate seat in New Jersey. CENTER FOR RESPONSIVE POLITICS, BILL BRADLEY; bradbil.pdf, *available at* http://www.opensecrets.org. In 1990, a mere twelve years later, *Amicus* Senator Bradley spent nearly $12.5 million in his reelection bid, raising approximately forty thousand dollars per week, every week for six years. Likewise, in the 1990 senatorial race in Wyoming, *Amicus* Simpson spent $1,443,298 to win re-election, 3.3 times the amount spent in 1978. CENTER FOR RESPONSIVE POLITICS, ALAN SIMPSON; simpsala.pdf, *available at* http://www.opensecrets.org.

Overall Congressional candidate fundraising increased 425 percent between 1978 and 2000, compared to 170 percent inflation during the same period. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 7 (2003). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from $359,577 to $848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase. Similarly, the average victorious Senate campaign in 1986 cost $3,067,559 compared to $7,389,176 in 2000 – a 154 percent increase, adjusted for inflation. *Id.*[3]

In the realm of presidential politics, spending has escalated at an even more alarming rate. In his bid for the Democratic Presidential Nomination in 2000 Senator Bradley, although no longer a member of the Senate, raised $8,607,781 in campaign contributions in his most successful fundraising quarter. FEDERAL ELECTION COMMISSION, "Large Fundraising Quarters in Pre-Election Years For Presidential Primary Campaigns," *available at* http://www.fec.gov (measured from October 1, 1999 through December 31, 1999). Sitting Vice President Al Gore, the eventual Democratic Party nominee for President, had his largest fundraising quarter in the first quarter of 1999 during which time he raised $8,881,976. *Id.* (measured from January 1, 1999 through March 31,

[3] The following breakdown is particular noteworthy. In 1992, the average Senator had to raise nearly $13,000 each week for the entire six-years term in order to amass the amount that a winning Senate race would cost. Herbert Alexander, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992). By 2001, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise $10,000 *per day*. 145 Cong. Rec. S 12575, S 12608 (daily ed. Oct. 14, 1999) (statement of Senator Barbara Boxer).

1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in ninety-one days while serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the 2004 presidential election, which shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and raised a combined total of $496.6 million in contributions from individuals. *Report of Receipts and Disbursements: Bush-Cheney '04 Inc.*, filed 9/20/04, *available at* http://www.fec.gov; *Report of Receipts and Disbursements: John Kerry for President Inc.*, filed 9/20/04, *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As a Result of Spiraling Campaign Costs, Elected Officials Spend An Excessive and Ever-Increasing Proportion of Their Time Raising Funds for the Purposes of Re-election and Election to Higher Office.

As a result of spiraling campaign costs, elected officials spend an excessive and ever-increasing proportion of their time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress

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[4] *See, e.g.*, 147 Cong. Rec. S 2603 (daily ed. Mar. 21, 2001) (statement of Senator Richard Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch ar effective campaign."); 133 Cong. Rec. S 7782 (daily ed. Sept. 21, 1997) (statement

(Continued on following page)

spend many hours each week – and sometimes each day – raising money, "dialing for dollars,"[5] and attending fund-raisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized . . . When I was running, I was spending about two hours a day on the phone raising money. Minimum. Six days a week. That takes away from your ability to represent your constituents, or to do your legislative work, or what have you." Martin Schram, SPEAKING FREELY 38. Elected officials also travel frequently in order to raise money, not only within their own states, but also to other states with high concentrations of wealthy donors.[7]

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of Senator Harry Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A1 (quoting Senator Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," Statement of House Minority Leader Robert Michel; and "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," Statement of Representative Dave Durenberger).

[7] For example, in 1986 then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los

(Continued on following page)

Moreover, in order to meet the inordinate demands of a successful fundraising campaign, elected officials begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. "As soon as a Senator is elected here," said Senator Tom Harkin, "that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S 1053 (daily ed. Feb. 22, 1988). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan. 6, 1987).[8] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman). In sum, the current system relentlessly pressures office holders to spend a vast amount of their time fundraising.

Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 Nat'l J. 1448, 1448 (1990); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1998) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states.); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer," Statement of Representative Wyche Fowler).

[8] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for re-Election*, The Oregonian, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election).

C. The Time Spent Fundraising Diminishes the Quality of the Representation that Elected Officials Provide, and Undermines the Integrity of the Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." *See* James R. Carroll, *Senate Rejects Limits on Donations*, The Courier-Journal, March 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators no longer spend enough time on legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with fellow representatives. Rather, many legislators neglect these duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[9] Legislators often feel that they do not have the time to meet with or directly represent their constituents. As Representative

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[9] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, Los Angeles Times, July 24, 2000, at A3 (detailing Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amount of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

Christopher Shays lamented: "[Elected officials] spend far too much time fund-raising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H 339 (daily ed. Feb. 13, 2002). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[10] Representative Vin Weber stated that:

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[10] *See, e.g.*, 145 Cong. Rec. H 8225, H 8236 (daily ed. Sept. 15, 1999) (statement of Representative Thomas Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H 6937, H 6943 (daily ed. Aug. 3, 1998) (statement of Representative Marge Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing. Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S 5858 (May 15, 1991) (statement of Senator David Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

"when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending to their sworn duties and raising money for the purposes of re-election or election to a higher office.[11] One Congressman stated that the time spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[12]

Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office. The vast majority of a candidate's time is spent fundraising, as opposed to

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[11] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, Center for Responsive Politics, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1998); *see also* Larry Makinson, SPEAKING FREELY 39 (2d ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Representative Tom Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," Statement of Representative Leslie Byrne; and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," Statement of Senator Howard Metzenbaum).

[12] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had "been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

engaging with constituents, opponents or even ideas.[13] Because they are consumed with fundraising, candidates do not have time during their campaigns to engage the issues or the voters.[14]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed "institutional concern about the integrity of the U.S. Senate." Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM, at 4, 51 (1992). Former Senator Dennis De Concini said: "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and

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[13] *See* Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, Philadelphia Daily News, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face.").

[14] *See, e.g.*, 133 Cong. Rec. S 7782 (Statement of Senator Fritz Hollings ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Representative Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, Rocky Mountain News, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

raise money for my next election. And that always has bothered me from the standpoint of what I think the people elected me to do." Schram, SPEAKING FREELY 40 [15]

The current presidential election cycle provides a compelling example of the negative effects of unlimited spending. The two major party nominees, both current officeholders, decided to forego the public financing available in the primaries.[16] Instead, President Bush and Senator Kerry raised money at a pace of at least one million dollars per day, every day, while also serving as federal officeholders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that their time, and that of all elected officials, is a compelling interest worth protecting.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO *BUCKLEY V. VALEO*.

A. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital to Our System of Representative Democracy.

As discussed above, fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure

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[15] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[16] President Bush raised massive sums even though he had no primary opponent.

limits thus serve the vital interest of protecting our system from the demands that fundraising places on the time of our elected officials.

The American Republic is founded on the notion of elected representatives serving the people. As James Madison wrote in Federalist 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art. I; U.S. CONST. Amend. XVII; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[17] This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Moreover, the Constitution also directly protects the core functions of legislators. Thus, the Constitution's

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[17] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S. CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

Speech or Debate Clause protects the right of legislators to be free from interference with their core functions: debating, voting, and actions taken in pursuit of these lawful functions. U.S. CONST. art. I, § 6, cl. 1; *see also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation,"); *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (holding in a First Amendment case that the right of constituents to be "represented in governmental debates by the person they had elected to represent them" is an interest of the highest magnitude).

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. These hours represent time that could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vince Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994). When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

In sum, the time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Because elected representatives are at the heart of the American republic, the government has a compelling interest in protecting their time in service of the people.

B. Protecting the Integrity of Our System of Representative Democracy is a Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to *Buckley v. Valeo*.

In *Buckley* this Court held that laws that restrict campaign contributions or expenditures must meet exacting scrutiny.[18] The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived strict scrutiny on the grounds that: "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Commission*, 540 U.S. 93, ___, 124 S.Ct. 619, 660-61 (2003) (extending this rationale to justify limits on soft money contributions). This is precisely the interest served by protecting the time of legislators in the service of their

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[18] *Amici* suggest that the Court may also consider whether strict scrutiny is required when reviewing campaign finance reform measures, or whether a lesser level of scrutiny would suffice. Irrespective of the level of scrutiny, *amici* submit that there is at least a compelling government interest.

core legislative functions. Just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Similarly, the Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brow*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). As set forth above, the inordinate demands of fundraising have undermined the quality of campaigns and the electoral process in the same manner that they have undermined the quality of representation. Fundraising takes the place of debating the issues and meeting with constituents.

Buckley and the Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of representative democracy. Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley*

spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[19] Similarly, Justice Breyer, in an opinion joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws, so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

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[19] As petitioners have suggested, there is significant disagreement in the lower courts on this matter that the Supreme Court can resolve. Several appeals courts and judges have opined that time protection is a compelling government interest. In the instant matter, the Second Circuit observed that, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit has affirmed the time protection rationale as being a compelling government interest. A concurrence in the Sixth Circuit offers a similar perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). In a recent case from the Tenth Circuit, Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans v. City of Albuquerque and Rue v. City of Albuquerque*, 366 F.3d 900, 911 (10th Cir. 2004), *cert. denied*, 125 U.S. 625 (2004). But majorities in these two cases from the Sixth and Tenth Circuits ultimately disagree with the Second Circuit opinion in the instant matter. The Court should grant this petition in order to provide clear guidance and resolve this split among the circuits.

C. Vermont's Campaign Limits Directly Serve This Compelling Interest.

The record in the case demonstrates that Vermont's campaign expenditure limits serve the compelling government interest of protecting the integrity of our system of representative democracy.

In enacting the law in question, the Vermont General Assembly specifically found that the demands of fundraising take excessive time away from the people's business. 1997 Vt. Laws P.A. 64 (H.28) (finding No. 1). After a full trial, the District Court in this case agreed, finding that "the need to solicit money from large donors at times turns legislators away from their official duties." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). This was confirmed by the Second Circuit: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Landell v. Sorrell*, 382 F.3d 91, 121-22 (2d Cir. 2004).

The State of Vermont has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.[20]

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[20] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

(Continued on following page)

These limits are similar to the myriad efforts that other States and localities have taken to enact meaningful campaign reform, efforts that *amici* have long admired.[21] To the extent that the States are laboratories of democracy,[22] *amici* submit that this Court should clarify that experimentation like that undertaken by the State of Vermont is not per se banned by *Buckley*.

The limits adopted by the State of Vermont are supported by a compelling government interest. As in Vermont, without spending limits elected officials at all levels spend excessive amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating, and meeting with constituents – and the quality of campaigns. Protecting the integrity of elected office and of our system of representative democracy, both in the performance of elected officials and in the conduct of campaigns, is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of

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Ronald Michaelson, "Trends in Campaign Financing," *The Book of States*, Vol. 35, p. 275 (2003).

[21] *See, e.g.*, 142 Cong. Rec. S 377 (daily ed. Jan. 25, 1996) (Statement of Senator Bill Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[22] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should grant this petition for certiorari in order to resolve this important federal question, in light of conflicting lower court decisions, and to permit cities and states to continue to enact such reform in the service of our core democratic principles.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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In The

Supreme Court Of The United States

NEIL RANDALL, et al.
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

VERMONT REPUBLICAN STATE COMMITTEE
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, CALIFORNIA, HAWAII, IOWA, KENTUCKY, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF THE AMICI CURIAE

The amici curiae State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Conditional Cross Petitioners and urge this Court to resolve a clear split among the Circuits as to whether, and under what circumstances, campaign expenditure limits can pass constitutional muster.

Uncertainty surrounding the constitutionality of campaign expenditure limits has arisen as a result of the conflict between the Second Circuit's ruling in the present case, which concluded that *Buckley v. Valeo*, 424 U.S. 1 (1976), did not impose a *per se* ban on campaign expenditure limits, and the Tenth Circuit's ruling in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), which reached precisely the opposite conclusion.

The Amici States have a vital interest in this case because the uncertainty in the law resulting from the conflict between the Circuits, if left unresolved, will force States and municipalities across the country to waste valuable time and resources debating and repeatedly litigating this important constitutional issue, thereby imposing significant costs on state taxpayers, diverting legislative focus from other important matters, and burdening local judicial systems, all of which could be avoided by a ruling from this Court.

Accordingly, the Amici States respectfully urge this Court to grant certiorari to clarify the vitally important constitutional question whether, and under what circumstances, campaign expenditure limitations can pass constitutional muster.

REASON FOR GRANTING THE WRIT

THE UNCERTAINTY SURROUNDING THE CONSTITUTIONALITY OF CAMPAIGN EXPENDITURE LIMITATIONS, IF NOT RESOLVED, WILL FORCE STATES TO WASTE VALUABLE RESOURCES DEBATING AND REPEATEDLY LITIGATING AN IMPORTANT CONSTITUTIONAL ISSUE THAT COULD, AND SHOULD, BE RESOLVED BY THIS COURT.

A. The Second Circuit's Ruling In The Present Case And The Tenth Circuit's Ruling In *Homans* Are In Direct Conflict.

A critical issue in the present case is the constitutionality of the expenditure limitations that are a vital component of Vermont's campaign finance reform law, Vt. Stat. Ann. tit. 17, §§ 2801 - 2883. The petitioners argued in the Second Circuit that expenditure limitations were *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976), and could never be justified. The Second Circuit, however, disagreed, pointing out that "[t]he *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress' purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits." *Landell v. Sorrell*, 382 F.3d 91, 107 (2d Cir. 2004). According to the Second Circuit, *Buckley* "did not conclude that the Constitution would *always* prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations." *Id.* at 107 (emphasis added). Instead, "[i]t simply held that based on the record before it, '[n]o governmental interest that has been suggested is sufficient to justify' the federal expenditure limits." *Id.* at 107, quoting *Buckley*, 424 U.S. at 55. Accordingly, the Second Circuit concluded that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently

strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Id.* at 108. Examining the record before it, the Second Circuit concluded that two interests cited by Vermont in support of its expenditure limitations – the interest in avoiding the appearance and reality of corruption and the interest in protecting the time of officeholders from the burdens of fundraising -- were, taken together, sufficiently compelling to pass constitutional muster.

Last year, the Tenth Circuit considered the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), but reached precisely the opposite conclusion. As in the present case, the plaintiffs in *Homans* argued that expenditure limitations were *per se* barred by *Buckley*. Unlike the Second Circuit, however, the Tenth Circuit agreed with the plaintiffs, concluding that "under *Buckley* such restrictions cannot be supported as a matter of law." *Id.* at 914, citing *Kruse v. City of Cincinnati*, 142 F.3d 907, 915-916 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). In the Tenth Circuit's view, all three of the interests advanced by Albuquerque in support of its expenditure limits – the interest in avoiding the appearance and reality of corruption, the interest in protecting the time of officeholders from the burdens of fundraising, and the interest in encouraging a robust debate of the issues through electoral competition – were "constitutionally incapable of justifying spending restrictions as a matter of law." *Id.* at 914-915.[1] Thus, the Tenth Circuit and the Second Circuit have reached diametrically opposed conclusions regarding the constitutionality of expenditure limitations under *Buckley*.

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[1] Although the *Homans'* majority opinion elsewhere stated: "I agree that the *Buckley* Court did not adopt a *per se* rule against spending limits, " *Homans*, 366 F.3d at 915, the majority's analysis of the issues clearly demonstrates that it rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment.

B. State And Municipal Legislatures, Encouraged And Emboldened By The Second Circuit's Ruling, Have Begun To Adopt Reform Measures That Include Expenditure Limitations.

Encouraged that the Second Circuit's ruling has opened the door to reform measures that include campaign expenditure limitations, State and municipal legislators, who would not previously have considered such reforms, have recently begun to introduce in their respective jurisdictions, or to consider introducing, campaign finance reform bills that include mandatory expenditure limitations.

In Massachusetts, for example, a bill currently under consideration incorporates mandatory spending limits modeled on those in Vermont's Act 64. H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm). Specifically, the bill calls for limits on campaign expenditures for all general, special, and primary elections for state office, ranging from no more than $54,000 for candidates for the office of state representative, to no more than $3 million for candidates for the office of governor.

In North Carolina, legislators have introduced a bill that would impose mandatory expenditure limits on campaigns for the council of state and general assembly. H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005)(available at http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1533v0.html). Rather than specify dollar amounts, the Act would limit campaign expenditures to no more than 75% of the median amount spent by candidates in the last two comparable elections for the same office. *Id.* at § 2.

And in Oregon, proposed legislation seeks to limit campaign expenditures by restricting a candidate's expenditure of his or her own funds in an election campaign. H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess.

(Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro.html). Specifically, a candidate for statewide office would be prohibited from expending more than $50,000, and a candidate for any other public office would be limited to spending no more than $10,000, of his or her own funds. *Id.* at § 9.

Legislators in other States and certain municipalities are actively considering similar legislation, but have not yet introduced it. *See, e.g.*, Letter from Wisconsin Rep. Joseph Parisi to Jay Hecht, Wisconsin Common Cause, dated June 7, 2005 (Respondent-Intervenors Appendix 1).

C. If This Court Fails To Grant Certiorari, The Uncertainty In The Law Governing The Constitutionality Of Expenditure Limitations Will Force States To Waste Valuable Time And Resources Litigating The Issue Unnecessarily.

If this Court denies certiorari in the present case, and thereby fails to seize the opportunity to clarify the uncertainty in the law governing the constitutionality of campaign expenditure limitations, the case will be remanded to the District Court for an indefinite period of time during which State and local governments, faced with the split between the Circuits, will be forced to waste valuable time and resources debating and relitigating this important constitutional issue.

As noted above, legislators are looking at expenditure limitations with renewed interest following the Second Circuit's ruling in this case and are proposing legislation that incorporates such limits. To the extent that such measures are passed, the prevailing uncertainty surrounding their constitutionality will embroil States in legal challenges and appeals at considerable expense to the public fisc. Even if such measures are not passed, the time spent drafting, researching, introducing, and debating them

is valuable time that legislators could spend on other matters if they knew, for certain, whether expenditure limitations were constitutional. Without knowing, however, the legislative debates will continue and valuable state resources will be unnecessarily exhausted.

Even those States with no interest in adopting expenditure limitations stand to lose resources unnecessarily in the absence of clarification by this Court. Such a situation will result when a municipality within a State, or multiple municipalities, enact expenditure limitations for local candidates and thereby spur litigation that burdens the State's court system and administrative agencies. In *Homans*, for example, the City of Albuquerque's expenditure limitations resulted in both state and federal court challenges. *See Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1198-1199 (D.N.M. 2002).

To avoid this situation, certainty in the law is crucial. Only by resolving this issue now, will States be spared the inevitable burden of prolonged debate and repeated litigation that will result from the split between the Circuits. Accordingly, it is essential that this Court grant the petition to review the Second Circuit's ruling in this case and clarify this vitally important area of the law without further delay.

CONCLUSION

For all of the foregoing reasons, the Amici States respectfully request that this Court grant the petitions for writ of certiorari with regard to question 1 of the petitions in order to clarify whether, and under what circumstances, campaign expenditure limitations are constitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND RESPONDENTS-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of the Respondents-Conditional Cross Petitioners in these cases and Respondents-Intervenors-Conditional Cross Petitioners.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends described in this brief. *Amici* do not necessarily support spending limits in any particular campaigns for the bench, but they believe that states should have the option to

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[1] Letters of consent from counsel for all parties have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] *Amici curiae* are former Chief Justices of state high courts: Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994), Hon. Richard P. Guy (Washington Supreme Court, 1999-2001), Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995), Hon. Conrad L. Mallett, Jr. (Michigan Supreme Court, 1997-1998), Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992), Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001), Hon. Robert Utter (Washington Supreme Court, 1979-1981); former and current Associate Justices and Associate Judges of state high courts: Hon. Andy Douglas (Ohio Supreme Court, 1985-2002), Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996), Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993), Hon. Howard A. Levine (New York Court of Appeals, 1993-2002), Hon. David Newbern (Arkansas Supreme Court, 1985-1998), Hon. Alice Resnick (Ohio Supreme Court, 1989-present), Hon. Cruz Reynoso (California Supreme Court, 1982-1987); and former and current Justices and Judges of intermediate appellate and trial courts: Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002), Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977), Hon. James Wynn (North Carolina Court of Appeals, 1990-present).

consider such limits as a narrowly tailored response to imminent threats to the real and perceived impartiality and independence of the judiciary. *Amici* recognize that the instant case does not pertain directly to campaigns for the bench. But the petitioners in the instant case maintain that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is an absolute bar to mandatory spending limits, even in judicial elections. *Amici* therefore urge this Court to grant both their petitions (as to Question 1 in each) and the conditional cross petitions to resolve whether that interpretation is correct and, if it is, to reconsider *Buckley*.

Most of the *Amici* on this brief previously asked this Court to review the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004). They are now joined by additional former and current state judges and justices, who wish to renew that request with new campaign fundraising and interest group spending data from the 2004 state Supreme Court elections. The escalation in 2004 of the troubling trends described in their *amicus* brief last year brings new urgency to this request for consideration of the petitions (as to Question 1) and the conditional cross petitions in these cases.

SUMMARY OF ARGUMENT

The constitutionality of spending limits in judicial elections has never been considered by this Court. When *Buckley* was decided, campaigns for the bench were inexpensive, uncontentious, and largely unnoticed. There was no call for expenditure ceilings under the circumstances of those campaigns, and there was no reason for the *Buckley* Court to decide whether such caps could survive constitutional scrutiny.

But judicial elections have changed dramatically since the 1970s. Several states have seen million-dollar campaigns

for their Supreme Courts, and an arms-race mentality is growing, as candidates build ever-larger war chests in the search for electoral success. Without spending limits to reduce the demand for private contributions, candidates increasingly must solicit funds from wealthy special interests on either side of the issues likely to come before the court. The highly visible infusions of unlimited special interest money into the coffers of judicial candidates leaves the public wondering whether justice is for sale.

To date, courts reviewing the constitutionality of spending limits in judicial elections have not been willing to consider the changed circumstances of modern campaigns for the bench, which were not and could not be considered in *Buckley*. Their refusal is grounded on the same premise endorsed by petitioners in these cases—that *Buckley* represents an absolute bar to spending limits no matter what the circumstances. With traditional standards for judicial elections rapidly eroding—and, with them, public confidence in the courts—the petitions (as to Question 1) and the conditional cross petitions should be granted in these cases to clarify whether that interpretation is correct and, if so, to reconsider *Buckley*. See Point I.

The petitions (as to Question 1) and the conditional cross petitions should also be granted to resolve whether interests not considered in *Buckley* might justify spending limits in judicial elections. At least three distinct interests—in the impartiality of the judiciary, in its independence, and in the appearance of impartiality and independence—are potentially compelling enough to support such limits. At this critical juncture, when all three interests are in serious jeopardy, this Court should take the opportunity to consider whether *Buckley* permits consideration of new rationales for spending limits, and if it does not, to reconsider *Buckley*. See Point II.

ARGUMENT

I. The Changes in Judicial Campaigns Since the Decision in *Buckley* Are Grounds for Reconsideration of the Circumstances Under Which Spending Limits Might Be Constitutional.

In recent years, studies have documented the increasing demand for large sums of money to support candidacies for the bench in states with elective judiciaries. Because the contributions come principally from parties and attorneys who appear in court, the public concludes that the contributors are meant to influence, and do influence, decision-making on the bench. Because these developments post-dated the decision in *Buckley*, and because Congress did not presume to regulate state judicial elections in the Federal Election Campaign Act, the *Buckley* Court did not consider the constitutionality of spending limits in campaigns for the bench. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* bars such limits in all elections and, if it does, to reconsider *Buckley*.

A. Judicial Campaigns Have Materially Changed for the Worse Since *Buckley*.

It is no secret that "campaigning for a judicial post today can require substantial funds." *Republican Party of Minnesota v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Fundraising by state Supreme Court candidates jumped from $28,291,950 in 1998 to $45,636,059 in 2000, an increase of 61 percent in just one election cycle. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections* 7 (Justice at Stake 2002), *at* http://www.justiceatstake.org/files/JASMoneyReport.pdf [hereinafter *New Politics 2000*]. "That increase was no 'sport,' but a new peak in a clear, dramatic

trend whether viewed in terms of total dollars, or dollars-per-seat, or percentages." Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. St. U.-Detroit C.L. 849, 862. In 2002, the four general election candidates for two Ohio Supreme Court seats raised a total of $6,241,583, and none raised less than $1,193,732. Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections 2002* 15 (Justice at Stake 2004), *at* http://faircourts.org/files/NewPoliticsReport2002.pdf [hereinafter *New Politics 2002*].

The 2004 state Supreme Court elections continued this trend. For the third straight election cycle, more than 10 candidates raised as much as $1 million in pursuit of a seat on the bench. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, 14-15 & Fig. 10 (forthcoming Justice at Stake 2005), *available as of July 2005 at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf [hereinafter *New Politics 2004*]. In just one cycle, the cost of winning jumped 40 percent. *Id.* at 13-14. And nine out of 22 states with contested races broke aggregate fundraising records. *Id.* at 13.

The high and unquestionably growing demand for funds is in part the result of changes in the way campaigns are run. In 2000, Supreme Court candidates ran television ad campaigns in only four states. *New Politics 2000*, at 13. Two years later, the number of states seeing television commercials financed by Supreme Court candidates rose by 75 percent. *New Politics 2002*, at 8. This past year, candidates for their state's highest court bought television airtime in 16 states, quadrupling the number of states in just four years. *New Politics 2004*, at 3. The high cost of airtime forces judicial candidates to raise large sums from parties interested in influencing judicial decision-making. *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30

Cap. U. L. Rev. 455, 474 (2002) [hereinafter *Independence and Democratic Accountability*] ("The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests.").

Studies show that most of the money financing Supreme Court campaigns is raised from persons and entities who regularly appear in court. *See id.* ("Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates."). From 1989 through 2000, nearly half of all contributions to Supreme Court candidates came from attorneys and business. *New Politics 2000* at 9. In 2002, two thirds came from those sources. *New Politics 2002* at 18. Approximately 60 percent of funds raised by candidates in 2004 came from business and lawyers, with millions of additional dollars funneled through political parties and interest group associations. *New Politics 2004*, at 20, 26, 27 & Figs. 14, 17, 18.

> The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve an to retain judicial office.

Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1393 (2001) [hereinafter *Interest Groups*]. That visible dependence prompts complaints that candidates "sully the court's reputation by raising millions of dollars from parties and lawyers who have business before the court." Texans for Public Justice, *Payola Justice* (1998), *at* http://www.tpj.org/docs/1998/02/reports/payola/conclusions.html. Without spending limits, candidates of high integrity are sullied by a campaign finance system that leaves them no

choice but to raise as much as they can to ward off defeat or to win a seat.

B. The Unlimited Money Chase in Contemporary Judicial Elections Undermines Public Confidence in the Courts

The rapid spread of highly visible, expensive campaigns for the bench, financed by groups and individuals with stakes in the outcome of judicial decision-making, is taking a toll on the courts. Survey research has shown that 76 percent of registered voters believe that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 4 (2001), *at* http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7. A similar poll in 1999 found that 81 percent of the public thought that political considerations influence judge's decisions, and 78 percent believed that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, *at* http://www.ncsc.dni.us/ptc/ptc.htm.

Such statistics do not surprise the former Chief Justice of the (elected) Texas Supreme Court. He asks: "How can judges convince the public that their only constituency is the law when their tenure in office depends on campaign contributions from lawyers and litigants?" Hon. Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 Ohio St. L.J. 137, 144 (2003) [hereinafter *Electoral Accountability*]. Referring to the "obscene" amount of money spent on an Illinois Supreme Court race this year, the winning candidate asked, "What does it gain the people? How can people have faith in the system?" Ryan Keith,

Spending for Supreme Court Seat Renews Cry for Finance Reform, Associated Press, November 3, 2004.

The general public perception is shared, to a lesser but still alarming extent, by individuals with extensive experience in our justice system. Fully 26 percent of state court *judges* agreed that campaign contributions have more than a little influence on decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 5 (2002), *at* http://faircourts.org/files/JASJudgesSurveyResults.pdf. A 1999 survey of Texas state judges conducted by that state's Supreme Court and its bar association found that nearly half believed contributions had a significant effect on courtroom decisions. Texas Office of Court Administration & State Bar of Texas, *The Courts and the Legal Profession in Texas—The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys*, Executive Summary 5 (1999). Anecdotal evidence suggests that lawyers, too, believe that their contributions to judges affect their chances of success in court. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379 (2001) [hereinafter *On the Make*].

Even if trust in government is declining generally, erosion of confidence in the courts is of particular concern. "That is because the authority of 'the least dangerous branch' rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large." *Electoral Accountability*, at 144. Without public confidence in the fairness and impartiality of our courts, the rule of law is at risk.

C. This Court Should Grant Writs of Certiorari to Clarify the Application of *Buckley* to Circumstances Not Considered in That Case.

Judicial campaigns were not always contentious and expensive. "The old style of judicial campaign was a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications." *Interest Groups*, at 1393. The large campaign contributions and scandals of the Watergate years that motivated Congress to enact spending limits in the 1974 amendments to the Federal Election Campaign Act were confined at that time to elections for legislative and executive office. "Judicial campaigns first experienced [soaring spending] in only a few states, starting in the early 1980s." Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 Loy. L.A. L. Rev. 1489, 1489 (2001). *Buckley* thus did not and could not consider the special threats presented by uncontrolled fundraising in judicial elections when examining the state interests that might justify spending limits.

Notwithstanding this history, courts adjudicating the constitutionality of spending limits in judicial campaigns have interpreted *Buckley* to preclude such caps. *See Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1999), *aff'g*, 951 F. Supp. 693 (N.D. Ohio 1996). According to *Suster*, when considering the constitutionality of expenditure ceilings, "the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence," *id.* at 532, and every other justification must be summarily dismissed "irrespective of the *kind* of position sought," *id.* at 530. But the *White* Court has since declared, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. This Court should therefore grant the petitions (as to Question 1) and the

conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of the new and unique threats presented by uncontrolled fundraising from special interests in campaigns for the bench or the unique rationales for spending limits in those campaigns. If *Buckley* does represent that absolute bar, the writs should be granted to reconsider *Buckley*.

II. Limits on Spending in Judicial Campaigns Are Supported by Especially Compelling Interests Not Considered in *Buckley*.

Buckley considered and rejected three interests proffered in defense of spending limits in federal campaigns for executive and legislative office. 424 U.S. at 39-59. But "*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence." Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent l. Rev. 133, 135 (1998) [hereinafter *Preserving an Independent Judiciary*]. In addition to the interest in judicial independence, the interests in judicial impartiality and the appearance of independence and impartiality, *see* J.J. Gass, *After* White: *Defending and Amending the Canons of Judicial Ethics* (Brennan Center for Justice 2004), *at* http://www.brennancenter.org/resources/ji/ji4.pdf (defining the three separate interests) [hereinafter *After* White], also provide grounds for distinguishing *Buckley*. Deborah Goldberg, *Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance*, 64 Ohio St. L. J. 95, 116-17 (2003) ("[T]he state interests uniquely implicated in [campaigns for the bench] provide a compelling justification for limiting spending by judicial candidates."). Because courts reviewing the constitutionality of spending limits in judicial elections have rejected consideration of any

justifications not explicitly endorsed by the *Buckley* Court, writs of certiorari should be granted in these cases to eliminate any confusion about the nature of the interests that might justify caps on spending in specialized contexts.

A. Courts Should Be Permitted to Consider Whether the Interest in Judicial Impartiality Supports Spending Limits in Campaigns for the Bench.

The mandate for judicial impartiality is implicit in the Due Process Clause of the U.S. Constitution. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). As one court has recently affirmed, "litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum . . . ." *Raab v. State Comm'n on Judicial Conduct*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003). Although the term "impartiality" may be understood in a variety of ways, *see White*, 536 U.S. at 775-78; Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. Fla. J.L. & Pub. Pol'y 205, 21-19 (2004) (criticizing *White*'s analysis of impartiality), under one common post-*White* construction, impartiality is a compelling interest that may well support spending limits in judicial campaigns.

Since *White*, courts have recognized that impartiality precludes judges "from binding themselves, or appearing to bind themselves, to take action against particular *kinds* of parties." *After* White at 7 (emphasis added). On this understanding, admitted favoritism toward law enforcement in criminal cases is inconsistent with impartiality. *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 4-5 (N.Y. 2003); *In re Kinsey*, 852 So. 2d 77, 88-89 (Fla.), *cert. denied*, 124 S. Ct. 180 (2003). Impartiality would also

foreclose a preference for plaintiffs or defendants in tort cases.

But the dynamics of modern judicial elections press candidates for the bench toward precisely this form of bias. The unlimited demand for funds inherent in any campaign finance system without expenditure ceilings forces candidates to accept large sums from well-defined special interests, whether plaintiff-side personal injury lawyers or defense-side corporate lawyers. *Compare Independence and Democratic Accountability* at 474 (describing trial lawyer contributions) *with Preserving an Independent Judiciary* at 137 (describing contributions from corporate defense lawyers). We cannot assume that judges will ignore the prospect of losing that support in the next election if they fail to meet contributors' expectations. To reduce the demand for campaign funds and thereby combat that threat to impartiality, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

B. Courts Should Be Permitted to Consider Whether the Interest in Judicial Independence Supports Spending Limits in Campaigns for the Bench.

Like "impartiality," judicial "independence" is also susceptible to various interpretations, and the two terms are sometimes used interchangeably. *See White*, 536 U.S. at 775 n.6. But when "independence" is not used merely as a synonym for "impartiality," it speaks to a second value of constitutional significance—the principle of separation of powers. *See Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 532 (Ark. 2003) ("Judicial independence is a hallmark of our system of government, and we cannot abide . . . entanglements between the judicial and other branches of government . . . .").

> An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches . . . ; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

After White at 8. At the very least, the third aspect of judicial independence is implicated in the financing of campaigns for the bench.

Judicial campaign finance systems that require candidates to collect unlimited numbers of private contributions give enormous power to wealthy interest groups. The control by those groups over the large sums needed for campaigns carries with it the ability to influence the pool of judicial candidates. Candidates whose commitment to considering each case on its merits is demonstrably paramount will be less likely to attract support than candidates who give priority to political considerations. Increasingly, the distinction between the judiciary and the other branches of government—a distinction that enables courts to serve as a check on executive and legislative power—will be blurred. For this reason, too, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

C. Courts Should Be Permitted to Consider Whether the Interest in the Appearance of Impartiality and Independence Supports Spending Limits in Campaigns for the Bench.

The interest in the appearance of impartiality and independence is a third and distinct interest that may support spending limits in judicial elections. As this Court has recognized: "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do

their very best to weigh the scales of justice equally between the contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation omitted). Appearances count because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

That reputation has been besmirched by the influence of money in judicial elections. The unlimited fundraising from special interests on both sides of various policy debates has drawn accusations of "capture" and "legalized bribery." *On the Make* at 361, 427. There is a compelling interest in stemming this loss of trust, because "without public confidence the judicial branch could not function." Hon. William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U.L. Rev. 263, 274 (1996). Combating threats to the appearance of impartiality and independence represents a third compelling interest potentially justifying limits on spending in judicial elections. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of that interest or, if such consideration is barred, to revisit *Buckley*.

CONCLUSION

The changed circumstances of judicial elections over recent years and the distinct interests supporting spending limits in campaigns for the bench argue for allowing states to make the case for caps on judicial spending. As long as the ceilings are high enough to ensure that all candidates can convey their message to voters, due process concerns for the impartiality and independence of the courts—in reality and appearance—should overcome burdens on the candidates' First Amendment rights. But as *Buckley* has been interpreted

by the Sixth Circuit in *Suster* and the Tenth Circuit in *Homans*, the door is closed to such arguments. The instant petitions (in Question 1) and conditional cross petitions present a rare opportunity to revisit that reading of *Buckley* and to resolve a split among the circuits created by the Second Circuit in these cases. *Amici* understand that these cases do not directly concern judicial elections. But *Amici* respectfully request that the Court grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* presents an absolute bar to consideration of new facts and new state interests when reviewing the constitutionality of spending limits and, if such consideration is foreclosed, to revisit *Buckley*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE FANNIE LOU HAMER PROJECT; THE EQUAL JUSTICE SOCIETY; AND THE GREENLINING INSTITUTE IN SUPPORT OF RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND RESPONDENTS-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the National Association for the Advancement of Colored People, the Fannie Lou Hamer Project, the Equal Justice Society, and the Greenlining Institute (a coalition of community-based organizations of color) respectfully submit this brief *amici curiae* in support of Respondents-Conditional Cross Petitioners and Respondents-Intervenors-Conditional Cross Petitioners.[1]

Amici are organizations dedicated to improving the quality of life and the full participation in the political system of African American, Native American, Asian American/Pacific Islander and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality, and crime, as well as the lowest levels of employment, education and home ownership. *Amici* are confident that this situation can and will be changed when the electoral process gives them real access to political office, to elected officials, and to meaningful campaign participation.

SUMMARY OF ARGUMENT

Forty years ago, America celebrated the passage of the Voting Rights Act of 1965—a hard won promise of democratic inclusion and political equality for African Americans and other minority communities. Civil rights pioneers—many then members of organizations that today file this *amicus curiae* brief—devoted their lives to delivery

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

of the franchise to members of our democratic society who had been effectively excluded from the political process. The Voting Rights Act and federal enforcement methods provided these newly-empowered voting rights activists with powerful tools to combat systemic vote dilution and suppression. A series of cases in this Court decisively supported that effort and that outcome.[2]

Forty years later, these organizations file this *amici curiae* brief to make it clear that one of the most critical civil rights issues facing American politics today is the virtual exclusion of communities of color and the poor from the political process because of the unlimited, runaway costs of campaigns for elected office.[3] Access, influence and public office are the private reserve of those who can compete in this race for campaign funds. And the interests of those who are able to participate are often very different from those who are members of *Amici* organizations on issues of health care,

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[2] *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Gaston County v. United States*, 395 U.S. 285 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953).

[3] Despite the fact that racial minorities make up nearly 1/3 of the United States population, there is currently only one African American Senator and no Latino United States Senators, and only 1/6 of the United States House of Representatives are people of color. For statistics on population by race, *see* OVERVIEW OF RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf; for statistics on the racial make-up of the Congress, *see* MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE, *available at* http://www.senate.gov/reference/resources/pdf/RS21379.pdf.

wages, taxes, public schools, farm and factory conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this brief that properly tailored campaign expenditure limits are both constitutionally permissible *and necessary* to ensure that all Americans have equal footing in our Nation's process of governance. The Court of Appeals for the Second Circuit correctly held that neither the seminal campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), nor any subsequent opinion of this Court, impose an absolute bar to limits on campaign expenditures. Rather, after *Buckley*, both factual and legal grounds remain on which expenditure limits may survive constitutional review. As the Second Circuit held in this case, the Vermont Legislature established at least two interests to maintain campaign expenditure limits: deterring corruption and its appearance and protecting the time of candidates and elected officials. *Landell v. Sorrell*, 382 F.3d 91, 124 (2d Cir. 2004).

Buckley was decided in 1976—nearly thirty years ago. The campaign expenditure limits at issue then were struck down because this Court determined that legitimate goals could be accomplished through campaign contribution limits and disclosure only. As experience and the record below show, however, contribution limits alone have not been enough.[4]

In the three decades since *Buckley* was decided, the swiftly escalating levels of campaign fundraising and spending have fueled the erosion of citizen participation and

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[4] The 2004 election has broken all spending records. Candidates for federal office have spent $3.9 billion, a 30% increase over the $3 billion spent on federal elections four years ago. Center for Responsive Politics, *'04 Elections Expected to Cost Nearly $4 Billion* (Oct. 21, 2004 Press Release).

confidence in the electoral process. In Vermont, citizens expressed deep concerns that moneyed interests wielded inordinate influence over the political system and that ordinary voters could not compete. *Id.* at 100, 116. Vermont's elected officials were increasingly being forced to provide "privileged access to contributors *in exchange* for campaign money." *Id.* at 125 (emphasis in original). One former Vermont elected official testified that campaigns had come to reflect an "arms race" in spending that took elected officials away from their official duties to the public. *Id.* at 123. These concerns, along with many others, were precisely what sparked the passage of Vermont's campaign finance law, Act 64, in 1997 by bipartisan majorities in both houses of the Vermont Legislature.

These unparalleled and ever-increasing levels of campaign fundraising and spending also have severely restricted the access of minority and low-income communities to the political process. Minorities, who are overrepresented among the lowest economic levels in America, are largely left out of this critical political arena because making significant campaign contributions requires the type of disposable income that few minorities possess. Despite the gains of the Civil Rights Movement, minorities have lower incomes and less financial wealth than whites, control fewer business interests, and are disproportionately represented among those living in poverty.

For these reasons, furthering realistic opportunities for minority and low-income participation in the political arena should be recognized as an additional basis for reasonable limits on campaign spending. The local, state, and national electorate have a strong and legitimate interest in promoting equal participation, the openness and fairness of government, and the absence of corruption that can be best served by contribution *and expenditure* limits carefully calibrated to respect candidates' rights to freely express their ideas and positions.

ARGUMENT

I. In The Decades After *Buckley v. Valeo*, Dramatically Escalating Pressures To Raise And Spend Exorbitant Amounts To Maintain Viable Candidacies Are Denying Many Americans Fair And Meaningful Participation In The Democratic Process.

The Court of Appeals for the Second Circuit correctly held that neither the seminal 1976 campaign finance case, *Buckley v. Valeo*, nor any subsequent opinion of this Court, rendered campaign expenditure limits *per se* unconstitutional. In *Buckley*, this Court acknowledged that the problems of corruption and the appearance of corruption in electoral politics were severe enough to justify Congress' passage of certain regulations that restricted First Amendment rights. *Buckley*, 424 U.S. at 26–27, 45. This Court struck down the campaign expenditure limits at issue, however, because it determined that campaign contribution limits and disclosure alone were sufficient to limit the improper influence of money in elections. As experience and the record below show, however, things have not turned out that way. Indeed, as the Second Circuit noted, "an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional . . . would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Landell*, 382 F.3d at 110.

A. The Unparalleled and Escalating Levels Of Campaign Spending Erode Public Confidence and Imperil the Quality of Democratic Representation.

The powerful evidence considered by the Vermont Legislature and the District Court in support of Act 64's campaign expenditure limits demonstrates that the increasing

importance of money in Vermont's political campaigns leaves average citizens unwilling and unable to participate in the system. At trial, one expert testified that "nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government, and more than two thirds believe that 'large corporations and wealthy individuals have too much influence.'" *Landell*, 382 F.3d at 116 (expert report of Celinda C. Lake). Extensive evidence showed that the endless race for campaign funds hindered "public involvement and confidence in the electoral process" *id.* at 100, and that large donors were able to affect the legislature's agenda. *Id.* at 117. As the Court of Appeals for the Second Circuit recognized, "[w]here access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power." *Id.* at 119.

The detailed findings below also show that Vermont's system of unchecked expenditures created an "arms race" mentality in which each candidate felt compelled to raise the maximum amount possible because of the constant concern about being outspent. *Id.* at 117. Witnesses testified at trial that special interests wielded great influence on candidates in Vermont: "[P]ublic officials [were] functionally compelled to sell privileged access through the fundraising system." *Id.* at 100. Elected officials testified that they were wary of opposing too many special interests because those interests would stop providing campaign funds. *Id.* at 117.

Vermont also presented potent evidence that the pressure to raise large sums of money required elected officials to spend an inordinate amount of time courting large donors and less time on their official duties. *Id.* at 123. Numerous witnesses testified that, in the absence of spending limits, candidates and elected officials felt compelled to give access to large contributors over private citizens who do not or cannot make campaign contributions. At trial, Vermont

presented striking survey data that showed that 85% of Vermonters were concerned that "political fundraising took away time from important government business." *Id.* at 123. (testimony of Celinda C. Lake).

After 65 hearings involving testimony from 145 witnesses on the pervasive influence of money on the State's political system, the Vermont Legislature determined—by an overwhelming majority and with strong bipartisan support—that limits on *campaign spending*, in addition to limits on contributions, were essential to effect meaningful campaign finance reform.[5] In light of the hugely escalating pressures to raise and spend exorbitant amounts to maintain viable candidacies, this Court should uphold Act 64's campaign expenditure limits as the only realistic means for furthering Vermont's compelling interests in combating corruption and the appearance of corruption, and in protecting the time of candidates and elected officials. Properly tailored campaign expenditure limits are both constitutionally permissible *and necessary* to ensure that all Americans have equal footing in our Nation's process of governance.

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[5] The District Court found that Act 64's spending limits would allow officeholders more time to attend to their duties, protect access to the political arena, and preserve Vermont's citizens' faith in democracy. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 483 (D.Vt. 2000) (citations omitted). Although the District Court ultimately determined that Act 64's expenditure limits were unconstitutional, it noted that, based on the wealth of evidence in support of spending limits, it "underst[ood] why [the Vermont Legislature] included spending limits as part of its comprehensive campaign finance bill." *Id.* at 483. The Second Circuit Court of Appeals held that the Vermont Legislature established at least two interests to maintain campaign expenditure limits: deterring corruption and its appearance and protecting the time of candidates and elected officials. *Landell*, 382 F.3d at 124.

B. The Unparalleled and Escalating Levels Of Campaign Spending Severely Restrict Access of Minority and Low-Income Communities to the Political Process.

A large majority of voters, and especially minority voters, perceive the political process as subject to pervasive and corrupting influence by a few wealthy individuals and corporations. Members of minority groups are severely underrepresented among donors to political campaigns, and are increasingly politically marginalized as the amounts donated increase. In an America where the vast majority of campaign contributors are non-Hispanic white, communities of color perceive an endemic corruptive influence in campaign spending that, as time has proven, can only be entirely eliminated by direct restrictions on expenditures.

As has been well documented, running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE, *at* http://www.opensecrets.org.[6] The 2004 presidential race was also the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.* In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.*

Although more attention has been focused on federal

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[6] Portions of these arguments are drawn from Brief of *Amici Curiae* The National Association for the Advancement of Colored People et al., et al. in Support of Petitioners, in *City Of Albuquerque v. Homans*, No. 04-413, prepared by the law firm of Howard Rice Nemerovski Canady Falk & Rabkin.

election spending, there is big money in state government politics as well. A nationwide study on the 2000 state legislative and gubernatorial elections showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. EDWIN BENDER & SUE O'CONNELL, THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW 6 (Aug. 2002). The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8. *See also* SUE O'CONNELL, THE INSTITUTE ON MONEY IN STATE POLITICS, 2002 STATE ELECTIONS OVERVIEW 2 (Nov. 2004) (candidates for state-level offices raised $2.1 billion in the 2001-02 election cycle).

More significant than the bare numbers, however, is the direct impact that the ability of a candidate to raise money has on his or her chances of winning. In the 2002 Congressional primaries, candidates who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG Study"). In the general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE, *at* http://www.opensecrets.org. The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million (on average winners raised $4.1 million, and losers $2.9 million). *Id.* at 8.

Candidates who lack personal wealth[7] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, are unable to compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows how credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are unable to raise the funds necessary to compete.[8] In 42 out of 50 states, minority legislators who were members of state legislatures in 2003 on average raised less money than their white counterparts. SAMANTHA SANCHEZ, THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003 22 (April 2005). Individually, 81.5 percent of all minority state legislators raised less money than the average raised by the white candidates in their state.[9]

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[7] Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG Study, *supra*, at 6.

[8] While minorities make up 30.9 percent of the U.S. population, they made up only 11.3 percent of the members of state legislatures in 2003. THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003 5, 20 (April 2005). In fact, legislatures in all 50 states failed to reflect the diversity of their state's population. *Id.*

[9] In 36 of the 42 states (where 607 African American legislators were elected), African American legislators raised less on average than did white legislators, including several states with substantial numbers of African American lawmakers. SANCHEZ, MONEY AND DIVERSITY, *supra*, at 7. In 19 of the 27 states (where 140 Latino legislators were elected), Latino legislators raised less on average than white legislators, including several states with substantial Latino representation. *Id.* at 10. Asian Pacific American legislators raised less money than white legislators, on average in seven of the 11 states (where 72 APA legislators were elected). *Id.*

(continued . . .)

Id. See also Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99 (2002) (challenger minority candidates have a more difficult time raising money than white candidates).

The imperative to raise thousands of dollars gives the very small segment of the population capable of writing very large checks undue influence in determining who will be elected. In the 2002 election, less than one-quarter of one percent of the voting age population made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* Yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nationwide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000). The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate

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(. . . continued)

at 13. In 10 of the 11 states (where 36 Native Americans were elected), Native Americans raised less, on average, than white legislators, even in states with the highest Native American representation. *Id.* at 16.

candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000, and over 80% were college graduates. *Id.* Among the most active donors, over half had incomes of over $500,000, and only four percent had incomes of less than $100,000. *Id. However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race:* 99% of the donors were non-Hispanic white.[10] *Id.*

Minorities are left out of this critical political arena because making significant contributions requires a degree of disposable income that few minorities possess. Despite the gains of the Civil Rights Movement, the racial gap in family income has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). In 2000, the median African American family had an income equal to the national median *in 1965.*[11] *Id.* at 13.

The gap in wealth between non-Hispanic whites and minorities is even more striking. Between 1996 and 2002, the median African American and Hispanic household wealth

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[10] Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, and approximately 96% of these donors were non-Hispanic white. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

[11] In 2000, the median annual family income was $52,000 while the median African American family income was $31,000. Stoll, *supra*, at 13.

declined by 27%—while the median non-Hispanic white household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002 2 (Oct. 2004). The median white household wealth was $88,651—nearly fifteen times that of the median African American household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.* *See also* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) (because people of color have lower incomes, less wealth, fewer business interests, and higher poverty rates, their ability to contribute or spend political money is severely limited).

Public Campaign, a nonpartisan public interest organization, studied the relationship between campaign money and race. In its study, *The Color of Money: 2003*, Public Campaign organized by donors' ZIP code more than $2 billion in individual contributions of more than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles. PUBLIC CAMPAIGN, THE COLOR OF MONEY: 2003 1 (Major Findings) (2003). Public Campaign then compared these data with data from the 2000 U.S. Census on race, ethnicity and income by ZIP code, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

Public Campaign's analysis showed that neighborhoods comprised mostly of people of color are severely underrepresented in the campaign finance system. Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic white ($1.7 billion—85%—came in the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds came from predominantly African American ZIP codes, 1.8% from predominantly Latino ZIP codes, and .6% from

predominantly Asian Pacific American neighborhoods. *Id.* at 2. The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic white, and nearly 40% of its households have incomes of over $100,000.

Strikingly, this one ZIP code contributes more campaign cash than the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over—84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over—102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific-American population (representing 3,523,852 people ages 18 and over—39 times more people than live in 10021). *Id.* at 2. *See also* PUBLIC CAMPAIGN, THE COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE 3, 16, 18 (2004) (finding that President Bush collected 537 times more cash from top contributing majority non-Hispanic white ZIP codes than from ZIP codes with the highest percentage of people of color nationwide, and Senator Kerry, 452 times as much).

Thus, the evidence demonstrates first, and unsurprisingly, that the most affluent members of American society are vastly overrepresented in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely underrepresented among campaign donors. *See* Spencer Overton, *Voices From The Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541 (2001) ("observ[ing] that a history of discrimination has contributed to current racial disparities in property distribution which are, due to the current campaign finance system, replicated in political participation."). Economic inequality and racial disparity, along with the escalating dependence of political leaders on campaign contributions, threaten to imperil the

fundamental principle of equal representation in American politics. Campaign expenditure limits, as contained in Act 64, would foster effective representation and equal access to the political arena for all communities—including those most in need—people of color and the poor.

II. Because The Opportunity For Political Participation For All Citizens Is Fundamental To American Democracy, Furthering Realistic Opportunities For Minority And Low-Income Participation In The Political Process Is An Additional Basis For Reasonable Limits On Campaign Spending.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court recognized that government has an essential interest in promoting equal political participation by acknowledging the effects of racial discrimination in our country: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. This Court stated in *Grutter* that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to leadership in our democratic society, and the government has a vital interest in keeping that process open to all members of society. As we work together as a country

to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine our accomplishments if we effectively deprive the graduates of these programs of office, of access, and of a sense that government is understanding of and receptive to their views.

The governmental interest in promoting equal political participation has been endorsed in several cases decided by this Court. In *McConnell v. Federal Election Commission*, this Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." 540 U.S. 93, 206 n.88 (2003) (citation and internal quotation marks omitted). Equal p tical participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where this Court upheld a prohibition on corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging equal political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate—an election that appears to be up for sale—will appear corrupt.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth. . . ." Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of

candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134, 144 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, and struck down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support.

Id. at 143. "[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144. *See also Lubin v. Panish*, 415 U.S. 709 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[12] Economic barriers to full participation in the political process fall most heavily on minorities and touches on the most precious of constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the

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[12] 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

systemic exclusion of Negroes." H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views). *See also* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 264-65, 291 (forthcoming 2005) (Courts should weigh whether a campaign finance measure "appropriately serves the goals of increasing equality and reducing the concentration of power in the hands of the few, as articulated in the Voting Cases.").

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and re-entrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . . It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices.

H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. at 2471.

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a different variety than exists today. There are other types of unfair influence that

now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds, candidates for office are forced to give access and time to those who can provide money. The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000). (Breyer, J., joined by Ginsburg, J., concurring). The Constitution, he points out,

> often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.

Id. (citations omitted).

One valid basis for upholding limits on campaign expenditure limits is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice')." *Id.* at 401 (citations omitted). This Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be wholly foreign is a political system in which free speech is measured only in dollars and

major segments of society are left disaffected and ultimately as powerless to influence choice of candidates and public policy as they were decades ago. If this is the teaching of *Buckley*, *Amici* urge that it be revisited and modified or overturned. Legislators and citizens can and should be permitted to balance competing and compelling government interests in equal participation, absence of corruption, and broad buy-in to government with carefully drawn limits that still protect, and indeed encourage and permit, broad communication of ideas and positions. That is the system Vermont implemented in 1997 and *Amici* ask that it be sustained.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to grant the petitions for writ of certiorari with respect to the first question presented in each petition and uphold Act 64's campaign expenditure limitations. *Amici* further urge this Court to deny review of the remaining questions presented in the petitions, as none of them presents an issue warranting this Court's consideration.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF SENATOR JOHN F. REED, SENATOR ARLEN SPECTER, SENATOR MARIA E. CANTWELL, SENATOR CHRISTOPHER J. DODD, SENATOR RICHARD J. DURBIN, SENATOR EDWARD M. KENNEDY, SENATOR CARL LEVIN, SENATOR CHARLES E. SCHUMER IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF AMICI

Amici, Senator John F. Reed, Senator Arlen Specter, Senator Maria E. Cantwell, Senator Christopher J. Dodd, Senator Richard J. Durbin, Senator Edward M. Kennedy, Senator Carl Levin, Senator Charles E. Schumer are a bipartisan group of United States Senators.[1] The personal experiences of *amici*, as candidates and members of Congress, since this Court's decision in *Buckley* demonstrate the need for clearer and more comprehensive authority to vindicate the central premise in *Buckley*—that the government has a compelling interest in ensuring faith in the integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both elected representatives and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), properly accorded legislatures such deference with regard to contribution limits. The Court should clarify that equivalent deference is warranted with respect to the expenditure limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public faith's and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy. Indeed, such reforms will enhance the public debate that is the foundation of our democratic process.

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with petitioners that this Court should grant certiorari on the first question presented in the petitions—whether limitations on expenditures by candidates for state political office invariably violate the First Amendment. The Circuits are in direct and acknowledged conflict on that question. In this case, the Second Circuit has held that expenditure limits are not inevitably foreclosed by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), whereas the Sixth and Tenth Circuits have squarely held that *Buckley* categorically prohibits such laws. *See Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

Although *amici* support review of the campaign expenditure question in the petitions, their reasons for doing so are markedly different from those set forth in the petitions for certiorari. In pressing their arguments for review, petitioners contend that the First Amendment, as interpreted and applied by this Court in *Buckley*, forecloses expenditure limits under any circumstances, and that this is a proper understanding of the First Amendment. *Amici* have a different view. Specifically, *amici* believe *Buckley* can and should be read to provide governments with the leeway to impose campaign expenditure limitations if supported by a record of compelling state interests sufficient to support the limitations. Even more fundamentally, *amici* believe the premises of *Buckley* regarding expenditure limitations are ripe for re-examination in light of the three decades of experience under the regime of campaign finance regulation dictated by *Buckley*.

As the Court recognized in *McConnell v. FEC*, 540 U.S. 93 (2003), nothing in the three decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. Rather, the accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics continues to threaten the public's faith in the legitimacy of government and in the elections that choose whom shall govern—notwithstanding the existence of contribution limits of the kind upheld in *Buckley*. The issue presented in this case is thus simply not about censorship. Here "constitutionally protected interests lie on both sides of the legal question." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). There must be leeway for the government to address the core societal interest, recognized by this Court, *see Buckley*, 424 U.S. at 26-27, in ensuring the integrity—in every sense of the word—of our representative system of government. In *Shrink Missouri*, and even more emphatically in *McConnell*, this Court reaffirmed the importance of the competing constitutional interests at stake in the arena of campaign finance regulation—and the compelling nature of the government's interest in preserving the integrity of the electoral process.

The instant case provides an appropriate opportunity for the Court to reassess the strength of governments' interest in imposing candidate expenditure limitations in light of the experience of the last three decades under *Buckley*. *See Cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit expenditure limits,

"some have argued that such limits could be justified in light of post-*Buckley* developments in campaign finance") (citations omitted). More generally, this case presents an appropriate occasion for the Court to make clear that the First Amendment does not hamstring legislators' attempts to protect the viability of our very structure of government. "[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The needed leeway can be provided, consistent with the First Amendment, in two ways. First, intermediate scrutiny should apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Second, legislatures should be given substantial deference in the design and enactment of campaign finance laws. *Buckley* provided such deference with regard to contribution limits, and the practical experience of *amici* since *Buckley* with respect to the financing of campaigns has demonstrated that deference is warranted for all such laws. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what campaign finance laws are needed to sustain faith in the electoral process and enhance the

process of governance. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

REASONS FOR GRANTING REVIEW

This Court should grant certiorari to decide whether Vermont's campaign expenditure limitations categorically violate the First Amendment.

1. Certiorari is warranted because there is a direct and acknowledged conflict between the Second Circuit's decision in this case, and the decisions of the Sixth and Tenth Circuits, both of which have invalidated expenditure limitations on the ground that this Court's interpretation of the First Amendment in *Buckley v. Valeo* categorically forecloses such limitations. Resolution of that conflict is a matter of pressing importance, not only for the State of Vermont and many state and local governments that are considering similar expenditure limitations, but also for *amici* and other members of Congress committed to continuing the process of electoral reform on the federal level.

As the Second Circuit recognized in this case, *Buckley* should not be read as imposing an inflexible bar on campaign spending limitations. Reading *Buckley* that way would be anomalous in First Amendment jurisprudence. Even direct content-based restrictions of speech may be sustained if they are a narrowly tailored means of achieving a compelling governmental interest—a point the Court has vindicated directly in the context of the electoral process in

Burson v. Freeman. Thus, where—as here—government can demonstrate the existence of compelling interests in support of campaign expenditure limitations, those limitations should be sustained if they are an appropriately narrowly tailored response to the problem that motivated their enactment. In this critical respect, the Second Circuit was correct and the Sixth and Tenth Circuits were in error in their interpretation of *Buckley*.

2. Moreover, although Vermont's candidate expenditure limitation can withstand, and should be upheld, under *Buckley*'s articulation of the appropriate standard of review, *amici* submit that a more searching re-examination of *Buckley*'s analytical framework is in order. This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of reviews for laws challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (internal quotation marks omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation marks omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not [on] others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for doing so is unrelated to the

content of the expression, limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[2]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, campaign finance laws should be subjected to intermediate scrutiny if they are justified on grounds unrelated to the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3]

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[2] The mere fact that campaign finance laws only address laws related to campaign financing does not mean such laws are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (quotation marks omitted).

[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 528 U.S. at 386 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny.

Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law aims at the communicative impact of the speech affected.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws—including candidate expenditure limitations of the kind at issue here. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. As recognized, in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); alteration in original); *see also McConnell*, 540 U.S. at 203-04 (reaffirming compelling interest in preserving citizenry's faith in the electoral process).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by a public perception of the pervasive influence of money in politics.

It has been clear at least since *Ward* that it is the government's justification that is controlling. *Ward*, 491 U.S. at 791.

One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. International Union United Automobile Workers of Am.*, 352 U.S. 567, 575 (1957).

Additionally, reforms—and expenditure limits in particular—can be justified by a compelling content-neutral interest in preserving the quality of representation by eliminating the enormous burden of raising enormous campaign war chests. That this burden exists, and has come to dominate the professional lives of officeholders and candidates is not open to serious question. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281 (1994). As *amici* can attest, the incessant demands of fund-raising substantially impairs elected representatives in fulfilling their professional duties. Elected officials spend so much time raising campaign funds that they do not have enough time remaining to master issues, communicate with constituents and perform other essential parts of their jobs. This interest is not merely important: it is of a constitutional dimension in its own right.

This problem is the direct result of the absence of limits on campaign spending. Moreover, the fundraising burden on

candidates is a direct outgrowth of *Buckley*. By upholding limitations on contributions while striking down spending limits, *Buckley* established a legal structure that has proven untenable. If legislators address the risk of corruption by imposing contribution limitations, they force officeholders and candidates to spend most of their time raising campaign funds. If they decide to free officeholders and candidates from this burden by eliminating contribution limits, they must endure the risk of actual and perceived corruption of the electoral process.

These justifications for reform address public concerns wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

3. More generally, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance

laws. In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). That wisdom applies with particular force in the present context. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 548.

This deference has been applied to laws regulating the electoral process even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); alteration in original). There, the Court affirmed a campaign reform, even in the fact of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is warranted in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to access. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem [was] not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained.*"

Id. (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest). The Court made the same point in *Shrink Missouri*. Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 528 U.S. at 391. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 395.[4]

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[4] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 394-95.

This deference is appropriate, and should be afforded here. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. And the regime *Buckley* put in place has had the perverse consequence of burdening officeholders and candidates with the ceaseless task of fundraising to ensure adequate war chests—a burden that is eroding the quality of representative government in this country even as it erodes the public's faith in their elected officials. At the same time, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests on the other side of the balance.

Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

CONCLUSION

This Court should grant review of the question whether Vermont's campaign expenditure limitations violate the First Amendment.

Respectfully submitted,

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Supreme Court, U.S.
JUN 15 2005
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In The
Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

v.

WILLIAM SORRELL, et al.,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, et al.,

Petitioners,

v.

WILLIAM H. SORRELL, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, OREGON AND WISCONSIN IN SUPPORT OF GRANTING THE PETITIONS WITH REGARD TO THE FIRST QUESTION PRESENTED

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INTEREST OF *AMICI*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire, Bill Bradbury, Secretary of State of Oregon, and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their states, which gives them extensive experience with the issues raised in this case.

Amici seek review of the Second Circuit's decision because, although they believe that it is supported by this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), it is contrary to similar decisions of the Sixth and Tenth Circuits. As the chief elections officers in their states, they are particularly concerned about the impact that the split in the Circuits' decision will have on the ability of States and localities to enact effective reform measures sought by their citizens and legislators. Moreover, *Amici* are concerned about the detrimental impact that the split among the Second, Sixth and Tenth Circuits will have on their efforts to enact innovative campaign finance laws. As discussed further below, the present uncertainty regarding mandatory spending limits has a chilling effect on the creativity of the State and local governments which should be serving as laboratories of democracy.

If the Sixth and Tenth Circuits correctly interpreted *Buckley* as imposing a *per se* ban on mandatory campaign spending limits, *Amici* urge this Court to reconsider its holding in *Buckley* and permit Vermont to demonstrate

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

that its campaign expenditure limits satisfy constitutional requirements. If such a *per se* ban truly exists as a result of *Buckley* that ban will stifle the creativity of States and localities in this arena. As the Respondents demonstrate, the circumstances that led this Court to enact that barrier 29 years ago have changed. This Court should reconsider the extent of First Amendment limits on campaign expenditure laws.[3]

STATEMENT OF THE CASE

This case involves amendments to its campaign finance laws enacted by the State of Vermont in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. *See Landell v. Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments have succeeded in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the *Landell* District Court found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals in federal elections. *Id.* at 116-125. The Second Circuit summarized additional ills attributable to the lack of spending limits in our current system of campaign finance. *See id.* at 115.

A split among the circuits exists on this important issue. The Second Circuit, in this case, held that *Buckley* does not erect a campaign spending limits barrier while the Sixth and Tenth Circuits have held that such a barrier

[3] *Amici* also support the conditional cross-petitions of both William H. Sorrell, et al., the Respondent-Conditional Cross Petitioner and Vermont Public Interest Research Group, et al., Respondent-Intervenors-Conditional Cross Petitioners.

exists. *See* Randall Petition for Certiorari at 22; Vermont Republican State Committee ("VRSC") Petition for Certiorari at 5-7. The importance of this issue is demonstrated by studies that show the current degree of cynicism among the population and diminishing voter turnout. Regardless of the actual scope of *Buckley's* holding, *Amici* urge this Court to grant the Petition and remove the cloud over the constitutionality of campaign spending limits.

REASONS FOR PARTIALLY GRANTING THE PETITIONS

Amici urge granting the petitions with regard to the first question presented for three reasons. The first is the strong citizen desire for reform. That desire has expressed itself in numerous reform efforts. While some State and local legislative bodies have interpreted *Buckley* to allow mandatory campaign spending limits, the available data show that many have not enacted such limits because they believe that *Buckley* bars them. Second, this Court has recognized the benefit of allowing state legislatures – as the laboratories of democracy – to function as unfettered by judicial constraints as reasonably possible. Third, whether or not *Buckley* is correctly read to impose a *per se* barrier, declaring now that no such barrier exists will enable States and localities to address the problem more effectively because more minds will come to bear on the issue.

1. There is a strong desire for reform and experimentation in State and local governments. The results are simple expressions of disappointment with the high cost of campaigns and the perception of corruption that flows from the realities of fund raising. This appetite becomes

apparent with attempts to enact campaign spending limitations at the federal, State and local levels.

a. Politicians consider the fund-raising process debilitating because it takes away time that could be spent more valuably by serving their constituents. Politicians and commentators alike believe that too much valuable time is devoted to this ceaseless endeavor to raise funds.[3] This problem presents itself at the federal and local levels. At the state level, one study has shown that a majority of candidates for statewide office spend at least one-quarter of their time fund raising for their campaigns; nearly one-third of candidates for state legislative office are similarly preoccupied with fund raising.[4]

In addition, numerous Congressmen have recounted their fund raising experiences. For example, one Republican Senator (unnamed) admitted, "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your

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[3] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUMBIA L. REV. 1281 (1994) (stating that candidates spend too much time fund raising) [hereinafter Blasi, *Free Speech*] *citing*, DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79, 203-04 (1992); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 72-73, (1992); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 69, 91-92, 108 (1990); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 43-45, 197 (1990); BURDETT LOOMIS, THE NEW AMERICAN POLITICIAN: AMBITION, ENTREPRENEURSHIP, AND THE CHANGING FACE OF POLITICAL LIFE 195-96 (1988); ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 96 (1983). *Id.* at 1281 n.1.

[4] Paul S. Herrnson and Ronald A. Faucheaux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), *at* http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

ability to work here. It devours one's time – you spend the two or three years before your re-election fundraising. The other years, you're helping others."[5] Likewise, former House Majority leader Richard Gephardt has also explained that "[i]f you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the member's time just to raise money."[6]

The costs of elections at both the Federal and State levels have continued to skyrocket. This trend of rising costs, while evident to the *Buckley* Court in 1976, has continued to increase in the ensuing 29 years. The need for politicians to spend huge sums to win elections raises the perception of, and conditions for, corruption. Campaign funds often come from special interest groups with legislative agendas. When politicians win elections with these funds and then continue to receive financial backing from these same special interest groups, these politicians are likely to feel pressure to cater to these groups. *See Landell*, 382 F.3d at 117-118. Perhaps that is why the phrase "special interest politics" has become so commonplace in our national political discourse.

Similar to the problem with "special interest politics," a select few wealthy individuals and groups contribute the majority of campaign finances and thus possess a concentration of the political power. At least one commentator has posited that this power concentration creates a form of

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[5] PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988).

[6] Elizabeth Drew, Politics and Money: The New Road to Corruption 51 (1983).

vote dilution and is "incompatible with the Constitution's command of equality."[7]

Politicians routinely confirm that this problem is real. For example, former Rep. Dan Glickman (D-Kan.) admits that "[m]oney has made it more difficult for Democrats to define an economic agenda that is different from the Republican agenda; we are taking from the same contributors."[8] These very reasons are why Congress periodically considers solutions to free candidates from excessive fundraising obligations.[9]

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[7] Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 Minn. J. of Law & Inequality 239, 244-45 (2005).

[8] Ken Hechler, *Financing Elections: West Virginia, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990), *available at* http://www.polsci.wvu.edu/ipa/par/report_7_3.html [hereinafter Hechler, *Financing Elections*]. *See also, Free Speech and Campaign Finance Reform: Subcommittee Hearing on the Constitution Before the House Comm. on the Judiciary, 105th Cong. Sess.* 1 (1997) (attaching statement of Gene Karpinski, Executive Director of U.S. Public Interest Research Group stating "with this kind of influence accorded to big money in our political system, the candidates and the political parties will increasingly look alike on all issues of importance to moneyed interests"), *available at* http://www.house.gov.judiciary/22226.htm [hereinafter Karpinski, *Free Speech and Campaign Finance Reform*].

[9] In 1993, Members of the House of Representatives frequently commented on it. *See, e.g.*, 139 CONG. REC. H10656 (daily ed. Nov. 22, 1993) (remarks of Rep. Gejdenson); *id.* at H10665 (remarks of Rep. Harman); *id.* at H10670 (remarks of Rep. Reed); *id.* at H10671 (remarks of Rep. Hughes); *id.* at H10672 (remarks of Rep. Beilenson); *id.* at H10675 (remarks of Rep. Woolsey); Beth Donovan, *House Takes First Big Step in Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3248 (1993); Beth Donovan, *House Will Vote on Limits Nearly $1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993). *See also*, Marcus & Babcock, *One Day in the Fundraising Trail: Dawn to Dusk/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997 at A1, *quoting* U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political

(Continued on following page)

b. To address this need, which is felt at the State and local levels as much as at the federal level, various State and local governments have enacted – or considered but declined to enact – campaign spending limits. Since this Court's ruling in *Buckley* in 1976, however, legislatures and legal scholars have often understood the first Amendment as prohibiting *per se* mandatory campaign spending limits regulation.[10] In January 1997, Senator Arlen Specter (of Pennsylvania) commented that fundamental campaign finance reform remained impossible without overturning *Buckley*.[11] In advocating for campaign finance reform, he further stated, "[m]y concept of running for elective office . . . is a matter of issues, a matter of tenacity, a matter of integrity and how you conduct a campaign."[12]

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system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics."

[10] Indeed, in "Congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns." *See* Blasi, *Free Speech*, *supra* note 2, at 1288, *citing*, Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, 51 CONG. Q. WKLY. REP. 2215, 2217 (1993); Beth Donavan, *Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1534, 1539 (1993); Beth Donavan, *Constitutional Issues Frame Constitutional Options*, 51 CONG. Q. WKLY. REP. 437 (1993).

[11] Senator Specter also noted in his remarks on the floor of the Senate that a growing group of prominent legal scholars have called for the reversal of *Buckley*. 143 CONG. REC. S557-01, S558 (daily ed. Jan. 21, 1997) (statement of Sen. Specter). *See also* Karpinski, *Free Speech and Campaign Finance Reform*, *supra* note 7.

[12] 143 Cong. Rec. at S558, *supra* note 10.; *see also*, John C. Bonifaz, Brenda Wright, and Gregory Luke, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 41 (1999) ("Members of Congress have introduced 11 bills since 1976 which would establish campaign spending limits for federal elections.") Further, the note cites the following examples: S. 1684, 98th Cong. (1st Sess. 1983); S. 1185, 98th Cong. (1st Sess. 1983); S. 59, 99th Cong. (1st Sess. 1985); H.R. 2473,

(Continued on following page)

He emphasized that running for office should not be a simple function of money.

In spite of this adversity, the appetite for reform remains strong, and State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived *per se* barrier. For example, as noted by The Hoover Institution:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98.
- From 1972-1996, 45 initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment.
- 24 states, as of 1998, have statutes on the books providing some sort of public financing for election campaigns. Also, 12 states and New York City have some form of expenditure limitation.
- What these various states – and many municipalities – have in common is strong voter sentiment for change, harnessed by diverse grassroots coalitions and reform-minded legislators.[13]

100th Cong. (1st Sess. 1987); H.R. 1456, 101st Cong. (1st Sess. 1988); H. Res. 168, 103rd Cong. (1st Sess. 1993); H.R. 3571, 103rd Cong. (1st Sess. 1993); H.R. 3651, 104th Cong. (2d Sess. 1996); H.R. 3658, 104th Cong. (2d Sess. 1996); S. 1057, 105th Cong. (1st Sess. 1997); H.R. 77, 105th Cong. (1st Sess. 1997). *Id.* at 41, n.17.

[13] *Hoover Institution: Public Policy Inquiry, Campaign Finance, State and Local Overview, at* http://www.campaignfinancesite.org/structure states1.html (last updated Sept. 20, 2004).

Various state and federal polls confirm that voters are overwhelmingly in favor of more effective campaign finance reform.

- Between 1976 to 1986, campaign spending in West Virginia state Senate races increased an average of 875% from approximately $155,000 to $1,511,000. In 1986, a sample of West Virginia voters were polled regarding whether they believed "there should be a limit on how much a person can spend on running for public office." 75.5% said yes, 16.8% said no, and 7.7% were undecided.[14]

- 64% of Arizonans support public funding for campaigns (Arizona Republic poll, Oct. 2002) and 66% specifically support Clean Elections (KAET poll, June, 2002). 80% of Arizonans believe that contributions influence votes on public policy (Behavior Research Center poll, December, 2001).[15]

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[14] Hechler, *Financing Elections*, *supra* note 5. In its 1990 sessions, West Virginia's House of Delegates "passed, by a vote of 86-14, a constitutional amendment 'to amend the State Constitution to permit the Legislature to limit the amount of money which can be spent advocating or opposing a nomination or election of any candidate, or the passage or defeat of any issue, thing or item to be voted upon at public election.' The elation of supporters of the constitutional amendment, scheduled to be placed on the general election ballot in 1990, was short-lived, however. The state Senate quickly buried the amendment by double referencing it to the Government Organization and Judiciary Committees, where it died without further consideration despite frantic and repeated efforts of the secretary of state to revive it." *Id.*

[15] California Clean Election Campaign, *Arizona – Clean Elections Works! at* http://www.caclean.org/content/victories/az_works.php?path=content/victories/az_works.php&.

2. At various times and in various contexts, this Court has espoused the value of deferring to the legislative process to produce creative solutions to pressing social problems. Indeed, it is a canon of this Court that such cases should be decided narrowly. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 688 (2003). Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists. As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion) (cited in *Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). *Cf. Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (the "challenging task of crafting procedures for

safeguarding ... liberty interests is entrusted to the 'laboratory' of the states ... in the first instance.")

This Court should remove the artificial limit on States and localities imposed by a *per se* prohibition on campaign spending limits and, instead, make clear that the proper standard of review of such legislation is and will be meaningful scrutiny that is not "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

3. The current split among the circuits on this important issue demonstrates that it should be clarified by this Court. By clarifying *now* that no *per se* barrier is imposed by the First Amendment, this Court will be opening an avenue of reform to the States and localities eager to enact reform that they have avoided because of the belief that *Buckley* imposes a *per se* barrier to campaign spending limits.

Allowing the perception that the Sixth and Tenth Circuits correctly interpreted *Buckley* deprives citizens who reside within those Circuits of the creativity of the State and local legislatures whose spending limits legislation would surely be struck down.

The perception of a *per se* barrier constrains the legislative process in States and localities outside of those circuits. The chilling effect that flows from the uncertainty inherent in a circuit split is further compounded by the fact that every panel of circuit judges that has considered this issue has split on the question of whether *Buckley* imposes a *per se* barrier. The decision by the Second Circuit not to hear *Landell en banc*, alone, generated a 50-plus page collection of concurrences and dissents for a type

of decision typically disposed of with a single sentence. This effect cannot be ignored, for it extends far beyond the Tenth and Sixth Circuits.

Amici urge this Court to grant certiorari to decide whether to free our State and local legislatures from the constraints on their ability to experiment in the realm of campaign finance reform that are the byproduct of the belief that the First Amendment imposes a *per se* prohibition on campaign spending limits laws.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, DEMOS, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND RECLAIMDEMOCRACY.ORG IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

TheRestofUs.org is a nonprofit, nonpartisan organization whose mission is to reduce the influence of money on the

political process.[1] TheRestofUs.org works to inform and educate mainstream Americans, including the citizens of Vermont, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field. The organization has an interest in engaging citizens in the reform process, and the current perception that all spending limits are *per se* unconstitutional presents a significant barrier to the organization's work. TheRestofUs.org hopes the Court will take this opportunity to clarify the constitutionality of limits on campaign spending.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of Vermont PIRG, other state PIRGs have an interest in enacting spending limits in their states. U.S. PIRG believes that a clarification by the Court of the circumstances in which expenditure limits are constitutional would assist the State PIRGs in advocating for comprehensive campaign finance reform.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including Vermont, Common Cause's mission is to ensure open, accountable and effective government at the federal, state, and local level. Common Cause has a longstanding concern with problems in the nation's campaign finance system, including publicly advocating for the spending limit provisions of the Federal Election Campaign

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, and participating in the defense of FECA before the Supreme Court.

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in approximately a thousand communities and in every state, and numbers 150,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Demos is a nonprofit organization whose purpose is to help build a society in which America can achieve its highest ideals. Demos believes that this goal requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Demos believes that campaign spending limits, like those adopted by Vermont, help foster these goals by reducing the appearance of impropriety in political campaigns, increasing electoral competition, and allowing more of the electorate's voice to be heard.

Public Campaign is a nonprofit, nonpartisan organization dedicated to campaign reform that aims to reduce the role of big special-interest money in American politics. Public Campaign works with a range of organizations, including

some in Vermont, whose members are not fairly represented under the current campaign finance system in many states. Public Campaign believes that through state and national campaign reforms, like Vermont's Act 64, more citizens will seek elective office and become interested in local political affairs.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan organization that, through litigation, focuses Americans, including the citizens of Vermont, on unethical conduct on the part of government officials. CREW's aim is to encourage government officials to act in the public interest. CREW believes that campaign-spending limits, like those approved by Vermont, are an effective way to accomplish this goal.

ReclaimDemocracy.org is a nonprofit organization with a national membership that includes Vermont residents. The organization works to build a genuinely representative democracy based on the principle that one's influence should result from the quality of one's ideas and the energy put into promoting them, independent of one's financial status. If wealth is a determining factor in the ability of either voters or candidates to make their voices heard in electoral races, ReclaimDemocracy.org believes that the Constitution's promise of "equal protection of the laws" has been broken. ReclaimDemocracy.org asks the Court to affirm the State of Vermont's right to protect the equal protection guarantee of the Fourteenth Amendment through reasonable limits on campaign spending.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional national importance: whether interests beyond those addressed in *Buckley v. Valeo*, 424 U.S. 1 (1976), can justify state-enacted campaign expenditure limits governing candidates for state office. In an effort to address on a state level problems striking at the heart of democratic government, the Vermont

legislature enacted Act 64 in 1997 to limit (1) political-party donations to candidates, (2) donations from out-of-state contributors, and (3) candidate expenditures. After a series of appeals ending in the Second Circuit's denial of a rehearing *en banc*, the Second Circuit upheld the possible constitutionality of expenditure limits and recognized that *Buckley* did not impose a sweeping "fatal in fact"[2] strict scrutiny to all forms of expenditure limits.

As the Court has recognized since *Buckley*, unfettered campaign donations to and expenditures for political campaigns can create an appearance of impropriety and a perception that elected officials respond only to the special interests from which the money flows, thereby diminishing other citizens' confidence in government and discouraging those citizens from participating. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 147-48 (2003); *Buckley*, 424 U.S. at 26-27, 46-47; *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Campaign finance laws enacted in the wake of *Buckley* have not stemmed the tide of huge donations and expenditures that has overwhelmed modern political campaigns. *See McConnell*, 540 U.S. at 144-52. But although corruption concerns affect state government as well as federal government, state governments consider, and indeed are motivated by, other interests as well when shaping their electoral processes.

This Court has not, in the time since *Buckley*, specifically considered how and to what extent concerns other than corruption or the appearance of corruption balance the well-recognized First Amendment considerations implicated by

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[2] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

campaign finance restrictions in state elections. Vermont's experiment in campaign finance reform represents a state solution to state problems, even if the same problems exist at the federal level as well. *Buckley*'s standard of strict scrutiny review for expenditure limits recognized that campaign expenditure limits could be justified by interests beyond corruption. Given the importance of these other interests to the integrity of state elections, federalism concerns warrant a different and more flexible balancing of these interests when the limitations apply solely to state elections.

Amici respectfully request that the Court grant the petitions as to question one and the conditional cross-petition, particularly since this case presents the only certain opportunity for the Court to consider and resolve these critically important issues. Vermont is currently the only state with mandatory expenditure limits. The evolving lower court applications of *Buckley*, including the Tenth Circuit's recent view that *Buckley* bans all expenditure limits,[3] have made state legislatures reluctant to consider including expenditure limits in new reform legislation even when they believe they would be helpful in reducing corruption and meeting other state interests.[4] *Amici* ask this Court to speak to the question of the constitutional scope of state discretion

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[3] *Homans v. Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004).

[4] For two reasons, the trend of state legislatures and localities is to reject new campaign spending legislation that imposes mandatory expenditure limits. First, many states believe that mandatory expenditure limits are *per se* unconstitutional under *Buckley*, and more recently, *Homans*. Second, states are reluctant to enact mandatory expenditure limits because doing so opens them up to litigation similar to that facing the State of Vermont in the instant case. Until this Court clarifies the legal standards, efforts by states to enact expenditure limits as part of broader reform are likely to be very difficult to pass and, if passed, to lead to protracted litigation.

in this area, so the states have some guidance to inform their consideration of expenditure limits, not just a knee-jerk fear that they can never be defended under a strict scrutiny standard.

REASONS FOR GRANTING THE WRIT

I. *BUCKLEY* DOES NOT PRECLUDE STATE REGULATION OF CAMPAIGN EXPENDITURES.

The Second Circuit appropriately applied *Buckley v. Valeo*, 424 U.S. 1 (1976), to hold that limitations on campaign expenditures are not precluded *in toto*. *Buckley* expressly left open the possibility that expenditure limits, when sufficiently tailored, can pass constitutional muster. This case demonstrates that possibility, and gives the Court the opportunity squarely and cleanly to confirm the Second Circuit's ruling that important state interests beyond avoiding corruption balance against competing First Amendment interests, and to calibrate an appropriate constitutional test that shows due deference for federalism concerns.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA"), reforms Congress passed to prevent corruption and its appearance and maintain the integrity of the electoral process. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On the record before it, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify...[the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). The Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh relevant First Amendment concerns. *See id.*; *see also Landell v. Sorrell*, 382 F.3d 91, 107-10 (2d Cir. 2004).

The Court has never considered the constitutionality of a purely *state* regulation of *state* candidate expenditures. *Buckley* related solely to a federal regulation of federal candidates and did not consider whether campaign expenditure limits for state or local elections were constitutional. And the analysis of Vermont's expenditure limits should take into account that it is a state regulation of state elections, a distinction from *Buckley* that changes the constitutional calculus in at least two ways. First, the state's authority to decide how state representatives are selected represents a significant interest in its own right. Second, the smaller scale, structure, and process of state government warrant a greater deference to the interests above and beyond corruption, interests that justify campaign expenditure limitations and temper countervailing First Amendment concerns.

II. STATE REGULATION OF ELECTIONS, AND THE POWER OF STATES TO GOVERN THEMSELVES, COMPEL A DIFFERENT (AND MORE DEFERENTIAL) BALANCING OF THE INTERESTS BEARING ON EXPENDITURE RESTRICTIONS.

The undeniable fact that expenditure limits implicate the First Amendment does not end the inquiry. First Amendment concerns must be balanced against competing constitutional concerns, *see McConnell*, 540 U.S. at 136-37 (considering competing interests such as the integrity of the electoral process), including those First Amendment interests preserved by campaign spending limits. In the specific case of the Vermont expenditure limits, a number of competing interests should be considered and balanced along with anti-corruption interests, among them (1) the local electorate's interest in governing its own elections and (2) Vermont's interest in protecting the integrity of its government.

Vermont's first obvious and fundamental interest lies in the undeniable right of its citizens to determine their own form of government and regulate their own elections. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).[5] The right of citizens to determine how their state officials are to be elected appears in the text of the Constitution, *see, e.g.*, U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."); U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."), and has been affirmed repeatedly by this Court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) ("the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government'" and "is a power reserved to them" by the Tenth Amendment and the Guarantee Clause) (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (a state has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders").[6]

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[5] *See also Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."); *Duncan v. McCall*, 139 U.S. 449, 461 (1891) ("the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws").

[6] *See also Bates v. Jones*, 131 F.3d 843, 859 (9th Cir. 1997) (Rymer, J., concurring) ("to define how the [people of California]

Vermont should have the right to decide how to elect its state representatives, and that interest merits significant weight in any analysis of state campaign finance regulations.[7] In a related context, the Court "has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscription of the Fourteenth Amendment." *Gregory*, 501 U.S. at 468. In other contexts, the Court has calibrated the level of scrutiny to accord greater deference to local decision making in matters falling deeply within the prerogatives of state officials. So, for example, the Court deferred to a state's requirement of citizenship as a qualification for certain offices because "our scrutiny will not be so demanding where we deal with matters resting firmly

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want to be represented is a right secured to the citizens of each state"), *cert. denied*, 523 U.S. 1021 (1998); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 816 (1994) ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 41 (1988) ("The guarantee clause . . . grants states control over their internal governmental machinery.").

[7] *See* Thomas Jefferson, *Drafts of the Kentucky Resolution of 1798*, in *The Works of Thomas Jefferson in Twelve Volumes* 458 463-464 (Paul Leicester Ford ed., G.P. Putnam's Sons 1904) (1798). Thus it is for the States or the people "to retain to themselves the right of judging how far the licentiousness of speech and the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." *Id.; see also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 222 (1998) (suggesting that the First Amendment should be treated differently when it is applied to the states under the doctrine of incorporation).

within a State's constitutional prerogatives." *Sugarman*, 413 U.S. at 648; *see also Gregory*, 501 U.S. at 462-463 (scrutiny is "less exacting" of state laws determining the qualifications of state officials). Vermont's right to govern and its interest in governing its own elections similarly are local interests of independent constitutional significance.

A second and equally important interest supporting expenditure limits is Vermont's interest in preserving the intergrity of its government. This interest lies in the stated rationales for Vermont's campaign expenditure limits: preventing actual or apparent corruption, promoting electoral competition, reducing officeholders' time devoted to fundraising, and bolstering public involvement and confidence in the electoral process.[8] All of these rationales are directed at the underlying goal of ensuring effective representative democracy,[9] a goal that the United States, including the federal judiciary, has a constitutional obligation to help state government achieve. *See* U.S. Const. art. IV, § 4; *Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *see generally* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767 (2003).

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[8] *Landell*, 382 F.3d at 115. Apart from the competing constitutional interest of strengthening representative government, these rationales also represent valid compelling government interests justifying the restrictions imposed by Vermont's expenditure limits under the strict scrutiny analysis set forth by this Court in *Buckley* for federal expenditure limits. *Id.* at 115-25 (finding that preventing actual and apparent corruption and protecting the time of candidates can be compelling interests).

[9] As the Second Circuit made clear, the state's interest in preserving the integrity of the electoral process is an underlying basis for preventing actual and apparent corruption and protecting candidate time. *Landell*, 382 F.3d at 124 n.18.

To foster effective representative democracy, a state government must have the authority to enact campaign finance laws that support open debate and encourage political participation, as that state judges appropriate to its circumstances. But most states' current system of unlimited expenditures has not protected the First Amendment's guarantee of a fair and open democratic process.[10] Today's unlimited-expenditure campaigns stifle the voices of the majority of the electorate because the bulk of campaign spending goes toward the purchase of costly broadcast media campaign speech.[11] The majority of campaign speech, therefore, is controlled by a small number of candidates capable of spending unlimited sums of money. And as the broadcast speech drowns out other forms of expression, the ordinary electorate struggles for any effective means of raising its own issues and influencing the debate and discussion that leads to informed electoral choices. Moreover, modern spending levels discourage challengers from participating in the electoral process; and the resulting elimination of competition smothers meaningful discussion of political issues. *Landell*, 382 F.3d at 128.

Vermont's interest in protecting and strengthening its own representative government by limiting expenditures outweighs *competing* First Amendment concerns. "[P]reserving the integrity of the electoral process . . . is [an] interest[] of the highest importance." *See First National Bank v. Bellotti*, 435 U.S. 765, 788-789 (1978). Vermont's

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[10] *See, e.g.*, Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1059 (1999).

[11] *Cf. Landell*, 382 F.3d at 130 (stating that, with expenditure limits in place, candidates have the opportunity to engage in low-cost campaigning, like town barbeques and door-to-door campaigning); *see, e.g.*, James V. Grimaldi & Thomas B. Edsall, *Super Rich Step Into Political Vacuum: McCain-Feingold Paved Way for 527s*, Wash. Post, Oct. 17, 2004, at A01.

expenditure limitations promote the general constitutional objective of open and active representational democracy by allowing a broader segment of the electorate to run for office, by reducing the impression that campaigns are bought and sold by wealthy contributors, by liberating officials and candidates from the constant need to neglect substantive matters for fundraising responsibilities, and by ensuring that public discourse remains uninhibited, robust, and open to the entire electorate.[12] For these reasons, Vermont's experiment with reasonable expenditure limits will lead to greater trust in state elections and promote greater competition and public participation in state elections. "Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process," *California Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring), and thus, the state electorate's responsibility for operating its own government, especially when combined with its interests in preserving the health of representative government, outweighs infringements on free speech that result from reasonable limits on local candidates' campaign expenditures.

III. THE NATURE OF STATE GOVERNMENT FURTHER TEMPERS CANDIDATES' FIRST AMENDMENT CONCERNS HERE.

The structure and purpose of state government vary significantly from those of the federal government. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." The Federalist, No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). State government meets the unique needs of the state through

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[12] *See Landell*, 382 F.3d at 115-24; *see also Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *id.* at 390-392; *id.* at 409 (Kennedy, J., dissenting).

regulating and monitoring planning and growth initiatives, transportation services, public education, and the daily concerns of constituents. These tasks require state government officials to be more directly involved in the day-to-day minutiae of their communities than representatives to the federal government might be. State officials focus their understanding of state needs differently and interact differently with individuals and local businesses than do representatives with broader national constituencies.

By design, state government officials are more acutely aware than their federal counterparts of the day-to-day needs of state constituents. In theory, state officials should be more accessible and devote more time to constituent needs than their federal counterparts. The Vermont General Assembly found that, prior to Act 64, candidates for state office were spending an inordinate amount of time raising campaign funds in order to avoid being outspent by their opponents. The Second Circuit upheld the District Court's finding that "'the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters.'" *See Landell*, 382 F.3d at 119-24. The need for unlimited campaign dollars forces elected officials to devote attention to identifying and responding to an ever-increasing number of contributors, and Vermont ought to have the ability to counter that disturbing trend.

State officials' intimate relationship with constituents only heightens the potential for and fallout from state corruption or the appearance of state corruption. State government officials frequently are responsible for contracts and other forms of purchases from vendors of public services who are often major contributors to the official's campaign. In smaller geographic areas, where state officials are more likely to be connected to constituent businesses on a personal level, money poured into a candidate's war chest, even in limited amounts, may well be viewed as a *quid pro quo* when

the sum of these contributions greatly outweighs other candidates' funds because it appears that self-interested donors have helped "buy" an election outcome. This corruption or perceived corruption lessens the confidence of citizens in their state government. The legislature of Vermont enacted campaign expenditure limits specifically to combat this possibility, and for the other reasons noted above. *Cf. Nixon*, 528 U.S. at 394.

The opportunity for corruption has special significance at the state level for other reasons as well. For example, the political weight of a dollar in a state election may be greater than the weight of the same dollar in a federal election. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997). The more money that appears in these smaller, state electoral systems, the greater the potential for the appearance of corruption. Moreover, states may well be less able to devote scarce time and sparse resources to investigating and combating corrupt fundraising practices.[13]

If a dollar weighs more in state elections, the need for more dollars diminishes. In state elections, a smaller geographic area or smaller number of constituents allows candidates to communicate through less expensive media than candidates for federal office. In the case of Vermont legislative candidates, an effective campaign need not undertake or finance large-scale media campaigns across multiple markets to communicate with voters. Rather, the Vermont legislature found door-to-door communications were preferred and expected among Vermont voters. *Landell*, 382 F.3d at 130-31. Because the cost of running a

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[13] *See* Nancy Northrup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1681 (1987); Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l. & Comp. L. 793 (2001).

state election is often far less than a federal campaign, and because a state is best able to determine reasonable expenditure limits based on its unique geography and population, expenditure limits at a state level are unlikely to "drive the sound of a candidate's voice below the level of notice" and thus infringe on the candidate's First Amendment right of free speech. *Cf. Nixon*, 528 U.S. at 397. This plain difference in scale compels a different balancing of interests when analyzing expenditure limitations in a state election than the Court applied when analyzing the federal expenditure limits at issue in *Buckley*.

IV. STATE GOVERNMENTS NEED EVEN GREATER FLEXIBILITY THAN THE DECISION BELOW ALLOWS TO SOLVE THE PROBLEMS ASSOCIATED WITH FINANCING OF STATE ELECTIONS.

Citizens have the greatest interest and the most intimate familiarity with the particular concerns of their states:

> The first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. . . . By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these the people will be more familiar[]. . . .

The Federalist, No. 46, at 294-295 (James Madison) (Clinton Rossiter ed., 1961). As in those early days, citizens and their local leaders are still most familiar with the issues and problems that plague their local electoral systems. Their efforts to formulate appropriate measures to secure their

chosen form of government are, therefore, entitled to deference.[14]

Our system of federalism encourages states to experiment in their electoral systems to provide novel solutions to the problems associated with campaign financing. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[15] But the rigid application of *Buckley* by courts other than the Second Circuit has handcuffed states that wish to address the problems that plague their local systems—systems that the voters and local legislators understand far better than the federal courts. In order for local governments to protect and maintain truly representative democracies that are free from corruption, states must be allowed to serve as the testing grounds for new forms of campaign finance reform.

From the very founding of our nation, States have in fact served as laboratories for innovations in government. The

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[14] *See Landell*, 382 F.3d at 97 n.1 ("we respect the Vermont Legislature's similar reliance – in enacting regulations on both campaign contributions and expenditures – on its substantial historical experience with campaign finance reform and its informed predictions about Vermont candidate and donor behavior."); *id.* at 112-13 ("Some degree of deference on the issue of whether there are state interests that justify legislative changes to the State's electoral system may also be appropriate.").

[15] *See also* Stephen Breyer, *Our Democratic Constitution*, Madison Lecture, 77 N.Y.U. L. Rev. 245, 257 (May 2002) ("By guaranteeing state and local governments broad decisionmaking authority, federalist principles facilitate 'novel social and economic experiments,' secure decisions that rest on knowledge of local circumstances, and help to develop a sense of shared purposes among local citizens.").

federal constitution was modeled after the constitutions of the individual states, and federal initiatives have often been derived from state innovations such as the extension of the vote to African Americans, women, and eighteen-year-olds; the abolition of slavery; the direct election of U.S. Senators; workers' compensation legislation; minimum wage laws; and many significant environmental regulations. *See* Frederick Schwarz, *From the Ground Up: Local Lessons From National Reform*, 27 Fordham Urb. L.J. 5, 16-19 (1999). Even after enactment of the Bipartisan Campaign Reform Act – an extraordinary effort at comprehensive reform – the flow of large contributions to support candidates haunts elections at all levels of government across the country. *See* Grimaldi & Edsall, *Super Rich Step Into Political Vacuum*, W h. Post, Oct. 17, 2004, at A01; *see also McConnell*, 540 U.S. at 224 (explaining that "Money, like water, will always find an outlet," therefore, limiting the use of money is necessary for true reform). The job of reforming the broken system of campaign financing remains unfinished at the national level, and can best be achieved by allowing for innovation in local and state election systems.

This petition presents the Court with an opportunity at a critical time to recalibrate the balance of constitutional interests bearing on campaign expenditure limits in the state and local context. Many states apparently have taken *Buckley* to prohibit expenditure reforms outright.[16] Further,

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[16] The National Conference of State Legislatures, for example, cautions that "the court has ruled that spending limits are constitutional only if they are optional." *Campaign Finance at* http://www.ncsl.org/programs/legman/about/campfin.htm. Vermont's experience is illustrative. Vermont implemented mandatory expenditure limits for primaries in 1961 and general elections in 1971, but repealed those limits in the wake of *Buckley*. 1961 Vt. Laws 178; 1971 Vt. Laws 259; 1975 Vt. Laws (Adj. Sess.) 188. In 1993, Vermont attempted to institute a system of voluntary expenditure limits; but discontinued those efforts when

the Tenth Circuit just last year struck down the only other remaining local expenditure limits of which *amici* are aware–relying on *Buckley* to justify what amounted to a categorical prohibition on expenditure limits.[17] Thus, the limits at issue are the only surviving state-level expenditure limits known to these *amici*, who are active participants in campaign finance legislative efforts around the country.

The Court should take this case to clarify the application of *Buckley* in the state and local contexts, and to correct the assumption, made by many other courts, state legislatures, and local governments, that the First Amendment categorically forbids any limits on the high level of campaign spending in state and local races. With the benefit of almost 30 years of experience since *Buckley*, this case presents an opportunity for the Court to calibrate the important differences in the balance of constitutional considerations affecting state and local elections and to account for the appropriate role of federalism and the value of local electoral participation in the scrutiny of state governments' innovations in the pursuit of democracy.[18]

CONCLUSION

For the foregoing reasons, the Court should grant the petitions as to question one and the conditional cross-petition for a writ of *certiorari*.

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they proved unworkable in practice. *See* Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997); *Landell*, 382 F.3d at 132.

[17] *See Homans*, 366 F.3d at 914-21.

[18] As Justice Kennedy has stated, "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting).

Respectfully submitted,

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SUPREME COURT, U.S.

(29) (28) (17)

Nos. 04-1528, 04-1530, 04-1697

In the Supreme Court of the United States

NEIL RANDALL, ET AL.,

v.

WILLIAM H. SORRELL, ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL.,

v.

WILLIAM SORRELL, ET AL.

WILLIAM H. SORRELL, ET AL., AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, ET AL.,

v.

NEIL RANDALL, ET AL., AND VERMONT REPUBLICAN
STATE COMMITTEE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Certiorari Granted: September 27, 2005

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

Act 64	1a
District Court Opinion (8/10/2000)	21a
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Second Amended Denial of Petition for Rehearing En Banc; Concurring and Dissenting Opinions (4/11/05)	315a

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[1]The opinions of Judges Calabresi and Raggi were filed on May 11, 2005; thus, they were not included with the other Denial of Rehearing opinions printed in the Appendix to the Petition for Certiorari at 315a.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Docket Nos. 2:99-cv-146, 2:99-cv-234, 2:00-cv-57

MARCELLA LANDELL, et al., *Plaintiffs*,
NEIL RANDALL, et al., *Plaintiffs*, and
VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants* and
VERMONT PUBLIC INTEREST RESEARCH GROUP,
et al., *Defendants-Intervenors*

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/1999	---	ENDORSED ORDER: granting [28-1] motion to Consolidate Cases (2:99-cv-146 & 2:99-cv-234), consolidated lead case (Judge William K. Sessions III) Cy to parties (pjd) (Entered: 10/22/1999)
03/21/2000	84	ORDER consolidating case with 2:00-CV-57 (copy of original P#28 in 2:00-CV-57), consolidated lead case (Judge William K. Sessions III)

DATE	DOCKET NUMBER	PROCEEDINGS
		[EOD Date 3/21/00] Cy to parties (pjd) (Entered: 03/21/2000)
04/07/2000	---	MINUTE ENTRY: by Judge William K. Sessions III ***** ORDERED: cases remain consolidated, however; court trial will go forward on 5/8 through 5/17 with fact witnesses only; court trial will continue on 5/31 & 6/1 with expert witnesses *****
08/10/2000	130	OPINION AND ORDER 1) Act 64's contribution limits to candidates are constitutional; 2) Act 64's expenditure limits are unconstitutional; 3) Act 64's 25% limit on out-of-state funds is unconstitutional; 4) Act 64's $2000 limit on contributions to political parties is constitutional; 5) Act 64's $2000 limit on contributions to political committees and its various limits on contributions by political committees to candidates is constitutional; 6) Act 64's regulation of related expenditures is

DATE	DOCKET NUMBER	PROCEEDINGS
		constitutional as it relates to candidate contributions but unconstitutional as it relates to candidate expenditures; 7) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned within this order against pltfs (Judge William K. Sessions III) Cy to parties (law) Modified on 08/14/2000 (Entered: 08/10/2000)
08/10/2000	131	**VACATED - SEE P#168** JUDGMENT (Judge William K. Sessions III) dfts are herewith enjoined from enforcing the unconstitutional provisions mentioned against pltfs case closed Cy to parties (law) Modified on 08/14/2000 Modified on 2/24/2005 (jse). (Entered: 08/10/2000)
09/11/2000	136	NOTICE OF APPEAL by intervenors-defendants VT Public Int Rsrch, League Women Voters, Rural Vermont, Vt OWL, Vt Alliance Consv, Mike Fiorillo, Marion Grey, Phil Hoff, Frank

DATE	DOCKET NUMBER	PROCEEDINGS
		Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, Maria Thompson re: [131-1] judgment. *****
09/11/2000	138	NOTICE OF APPEAL by defendants William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand re: [131-1] judgment *****
09/22/2000	146	NOTICE OF CROSS-APPEAL by plaintiffs Donald R. Brunelle, VRLC-PC, VRLC-FIPE re: [131-1] judgment *****
09/22/2000	147	NOTICE OF CROSS-APPEAL by plaintiff VT Republican Comm re: [131-1] judgment. *****

DATE	DOCKET NUMBER	PROCEEDINGS
09/25/2000	148	NOTICE OF CROSS-APPEAL by plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, Vt Libertarian Party re: [131-1] judgment. *****
02/22/2005	168	MANDATE of USCA re: judgment of district court is AFFIRMED in part, VACATED in part, and REMANDED for further proceedings in accordance with the opinion of this Court. (Opinion not scanned; available for viewing at the Burlington Clerk's Office) Each party shall bear its own costs on this appeal. RE: [148] Notice of Appeal filed by Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, The Vermont Libertarian Party; [147] Notice of Appeal filed by Vermont Republican State Committee; [138] Notice of Appeal filed by Vincent Illuzzi, William Wright, William H. Sorrell, John T. Quinn, Dale O. Gray,

DATE	DOCKET NUMBER	PROCEEDINGS
		Lauren Bowerman, James Hughes, Joel W. Page, James D. McNight, James P. Mongeon, Terry Trono, Dan Davis, George E. Rice, Keith W. Flynn, Robert L. Sand; [136] Notice of Appeal filed by Vermont Public Interest Research Group, Cheryl Rivers, Rural Vermont, League of Women Voters of Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Maria Thompson; [146] Notice of Appeal filed by Donald R. Brunelle, Vermont Right to Life Committee--Political Committee, Vermont Right to Life Committee--Fund for Independent Political Expenditures. (cwb) (Entered: 02/22/2005)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-9159 (Lead), 00-9180 (con), 00-9231 (xap), 00-9239 (xap), and 00-9240 (xap)

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUSSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

V.

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL

VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	*****
5/7/01	Case heard before WINTER, STRAUB, POOLER C.JJ. (TAPE: #207) [DT]
	*****
8/7/02	Judgment of the district court is Affirmed in part, Vacated in part and Remanded by published signed opinion filed. (CJS) [00-9159, 00-9180, 00-9231, 00-9239, 00-9240] [DT]
8/7/02	Notice to counsel re: Opinion filed. [DT]
8/7/02	Judgment filed. [Entry Date: 8/7/02] [DT]
8/7/02	Judge RKW DISSENTING in a separate opinion filed. [DT]
	*****
10/3/02	Order filed stating re: An opinion and judgment having been filed on August 7, 2002, IT IS ORDERED that the opinion and judgment

DATE	PROCEEDINGS
	are hereby withdrawn, pending further proceedings before and amendment by the panel. As jurisdiction is retained by the panel, the mandate will not issue until further order. Before: RKW, CJS, RSP, C.JJ. (LC) [DT]
	*****
8/18/04	Judgment of the district court is Affirmed in part, vacated in part, and remanded for further proceedings by published signed opinion filed. (CJS) [EA]
8/18/04	Judge Winter dissents in a separate opinion, filed. [EA]
8/18/04	Judgment filed. [EA]
	*****
2/11/05	Order filed stating: A poll on in banc rehearing was conducted among the active judges of the court, a majority of whom voted to deny rehearing in banc. Judges of the court expect to file opinions in due course. (LC) [EA]
	*****
4/11/05	Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing in banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case in banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc was DENIED by order of the

court filed February 11, 2005. The court hereby AMENDS that order to further reflect that, upon consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was DENIED. Judge Winter dissents from the denial of rehearing.

The court also AMENDS the February 11, 2005, order to reflect the opinions dissenting from the court's denial of rehearing in banc filed by Chief Judge Walker, Judge Jacobs, and Judge Cabranes. Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley dissent from the denial of rehearing in banc. Simultaneously with this order, Chief Judge Walker is filing a dissenting opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join. Other judges of the court have indicated that they expect to file opinions concurring in the denial of in banc rehearing in due course. Further dissenting opinions may also be forthcoming. If further opinions or amended opinions are filed, this order will be amended as necessary to reflect those opinions. [AM]

*****

4/18/05 Judge Sack and Katzmann, C.JJ. with whom Sotomayor and B.D. Parker, C.JJ. join, concurring in the decision to deny rehearing en banc

DATE	PROCEEDINGS
	concurs in a separate opinion, filed.
	*****
5/11/05	Amended published signed opinion filed.
	Hon. Guido Calabresi, Circuit Judge, concurring in the denial of rehearing en banc.
	Hon. Reena Raggi, Circuit Judge, dissenting from the denial of rehearing en banc.

[U.S. Dist. Ct., Dist. of Vermont (Title omitted), Exhibit BBB-4; 2d Cir. Trial Exhibits Volume V:E-1705-12]

Secretary of State

CAMPAIGN FINANCE SUMMARY

GOVERNOR

1978		
Granai (D):	$	49,920.14
Snelling (R):	$	62,648.73
1980		
Clifford (R):	$	223.83
Cullen (I):	$	1,087.42
Diamond (D):	$	136,506.73
O'Connor (D):	$	54,874.41
Potthast(D/LU):	$	552.73
Snelling (R):	$	147,382.82
Woodward (I):	$	6,182.21
1982		
Buttolph (L):	$	386.00
Gottlieb (LU):	$	150.00
Kunin (D):	$	259,350.91
Snelling (R):	$	190,868.45
1984		
Easton (R):	$	547,854.62
Gottlieb:	$	800.00
Kunin (D):	$	408,379.96
Wick (R):	$	238,337.95
Wicker (L):	$	2,605.01
1986		
Gottlieb (LU):	$	16.25
Kunin (D):	$	517,995.69
Sanders (I):	$	57,859.53
Smith (R):	$	508,960.88

1988		
Kunin (D):	$	698,203.00
Bernhardt (R):	$	457,808.00
1990		
Atkinson (L):	$	6,273.25
Welch (D):	$	281,540.50
Snelling (R):	$	447,478.43
1992		
Dean (D):	$	253,527.17
McClaughry (R):	$	139,691.28
1994		
Allen (I):	$	626.21
Brueckner (I):	$	3,596.33
Dean (D):	$	180,144.85
Gropper (R):	$	11,675.89
Jaccaci (PV):	$	720.00
Kelley (R):	$	33,616.04
Lane (GR):	$	714.06
Morse (I):	$	113,426.53
St. Francis (IA):	$	890.00
1996		
Dean (D):	$	124,975.55
Gropper (R):	$	46,241.41
Herbert (LU):	$	454.00
Lane (GR):	$	556.00
Randall (Lib):	$	9,103.13
St. John (I):	$	6,471.66

LT. GOVERNOR

1980		
Garland (R):	$	27,697.67
Kunin (D):	$	35,994.22
1982		
Bouricius (CP):	$	383.10
Ryan (D):	$	13,582.21
Smith (R):	$	22,543.21
Sternbach (LU):	$	148.39
1984		
Carnahan (D):	$	20,422.91
Smith (R):	$	20,805.83
1986		
Auld (Susan) (R):	$	64,997.08
Dean (D):	$	68,424.00
Smith (R):	$	1,992.34
1988		
Zolatas (R):	$	19,733.00
Dean (D):	$	30,725.00
1990		
McCarren (R):	$	68,073.43
Dean (D):	$	121,551.13
Bernhardt (R):	$	153,054.67
1992		
Snelling (R):	$	106,917.98
Wolk (D):	$	69,786.98

1994

Racine (D):	$	100,453.03
Snelling (R):	$	100,614.60

1996

Carroll (R):	$	171,690.00
Coleman (GR):	$	205.66
Racine (D):	$	95,896.88

STATE TREASURER

1980

Hebard (R/D):	$	972.90

1982

Craven (LU):	$	256.61
Hebard (R):	$	1,126.56
Llana (D):	$	1,648.43

1984

Hebard (R):	$	752.60
Stone (CP/LU):	$	30.00

1986

Hebard (R):	$	803.85
Stone (LU):	$	10.00

1988

Walker (R):	$	31,846.62
Ruse (D):	$	27,619.29
Ellis (L):	$	506.21
Craven (LU):	$	726.63

1990		
Ruse (D)	$	33,830.64
Crisman (R)	$	28,255.03
1992		
Ruse (D):	$	82,664.00
Smith (R):	$	18,668.32
1994		
Douglas (R):	$	3,796.36
Schumacher (NL):	$	-0-
1996		
Bushey (GR)	$	-0-
Douglas (R/D)	$	1,815.61

SECRETARY OF STATE

1980		
Babcock (D):	$	17,302.95
Douglas (R):	$	19,461.56
McCann (D):	$	4,026.00
Smith (R):	$	49,127.40
1982		
Douglas (R/D):	$	2,622.53
Wicker (L):	$	179.19
1984		
Douglas (R):	$	3,332.07
Sharp (D):	$	861.07
1986		
Dodge (D):	$	6,990.27
Douglas (R):	$	10,085.01

1988		
Douglas (R)	$	1,431.23
1990		
Douglas (R/D)	$	1,568.07
1992		
Hooper (D):	$	73,194.07
Milne (R):	$	38,764.98
Stokes (R):	$	9,601.00
1994		
Hooper (D):	$	38,430.28
Mendicino (R):	$	14,827.03
Milne (R):	$	25,955.32
Padilla (NL):	$	-0-
1996		
Costanzo (Lib):	$	310.70
De Pierro (GR):	$	13.32
Milne (R/D):	$	2,750.66
AUDITOR OF ACCOUNTS		
1980		
Acebo (R/D):	$	998.99
1982		
Acebo (R):	$	1,648.96
Randlet (D):	$	50.00
1984		
Acebo (R):	$	1,047.23

1986		
Acebo (R):	$	-0-
1988		
Dana (L)	$	48.00
Rose (D)	$	444.00
Acebo (R)	$	2,606.88
1990		
Acebo (R)	$	6,082.08
Boucher (D)	$	27,723.8
1992		
Flanagan (D):	$	40,573.95
Crisman (R):	$	17,528.17
1994		
Flanagan (D):	$	29,127.63
McLaud (NL):	$	-0-
Redden (GR):	$	25.00
Thorn (R):	$	11,631.66
1996		
Baker (Lib):	$	516.36
Flanagan (D):	$	59,592.78
Morrissey (R):	$	26,885.93

ATTORNEY GENERAL

1980		
Easton (R):	$	66,888.00
Skinner (D):	$	54,040.79

1982		
Easton (R/D):	$	22,786.77
Teal (LU):	$	82.69
1984		
Amestoy (R):	$	60,151.84
Condosta (LU):	$	40.00
Lawlor (D):	$	37,579.35
1986		
Amestoy (R):	$	59,411.49
Condosta (LU):	$	.88
1988		
Flanagan (D):	$	135,901.35
Amestoy (R):	$	48,750.10
1990		
Amestoy (R/D):	$	1,900.95
1992		
Amestoy (R/D):	$	4,406.00
1994		
Amestoy (R):	$	3,571.95
Mulcahy (NL):	$	-0-
Talcott (GR):	$	-0-
1996		
Amestoy (R/D):	$	4,526.25
Kingston (GR):	$	.32

[U.S. Dist. Ct., Dist. of Vermont (Title omitted), Exhibit A; 2d Cir. Trial Exhibits Volume I:E-0095-96]

[NO. 64. AN ACT RELATING TO PUBLIC FINANCING OF ELECTION CAMPAIGNS, DISCLOSURE REQUIREMENTS AND LIMITS ON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES

(H.28)

It is hereby enacted by the General Assembly of the State of Vermont:]

*****

H. 28

*****

Sec. 1 LEGISLATIVE FINDINGS AND INTENT

(a) The General Assembly finds that:

(1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds.

(2) Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions.

(3) In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.

(4) Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.

(5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors.

(6) In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.

(7) In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

(8) Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small group contact between candidates and the electorate and will encourage the personal involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.

(9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.

(10) Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.

(11) Public financing of campaigns, conditioned on an appropriate number of qualifying contributions, will increase citizen participation and will limit the time

spent soliciting contributions, and will reduce the need of elected officials to respond to, and provide access to, contributors. As a result candidates will be freed to devote more time and energy to debate of the issues and elected officials will be able to spend more time responding to constituents and to performing their official duties.

(12) Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.

(13) In Vermont, campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

(14) Identification of persons who publish political advertisements assists in enforcement of the contribution and expenditure limitations established by this act.

(15) Because it is essential for all candidates to have their names and positions on issues known to the electorate and because incumbents have a substantial advantage in these areas, public grants and campaign expenditures must be reduced for incumbents.

(b) This act is necessary in order to implement more fully the provisions of Article 8 of Chapter 1 of the Constitution of the State of Vermont, which declares "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution."

(c) The General Assembly adopts this act to provide

public campaign financing for elections for certain offices, initially the offices of governor and lieutenant governor, to provide restrictions on excessive campaign expenditures, and to provide other regulations of contributions to and expenditures for election to office in the state.

[U.S. Dist. Ct., Dist. of Vermont, Exhibit BB; 2d Cir. Trial Exhibits Volume III:E-1094-1111]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

MARCELLA LANDELL, et al.,

v. Docket No. 2:99-cv-146

WILLIAM H. SORRELL, et al.,
Defendants
and
MIKE FIORELLO, et al.,
Defendant-Intervenors

NEIL RANDALL, et al.,
Plaintiffs

v. Docket No. 2:99-cv-234

WILLIAM H. SORRELL, et al.,
Defendants
and
MIKE FIORELLO, et al.,
Defendant-Intervenors

[Randall]PLAINTIFFS' RESPONSES TO DEFENDANTS' REQUESTS FOR ADMISSIONS

*****

49. Most candidates for the Vermont House of

Representatives do not use television advertising in their campaigns for election.

RESPONSE: Unable to admit or deny, as Plaintiffs do not have knowledge of what "most candidates" do. Plaintiffs admit that many candidates for the Vermont House of Representatives have not used television advertising in past campaigns.

*****

80. Most candidates for the Vermont House do not hire paid campaign managers.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates." Plaintiffs believe the matter is most likely true.

81. Most candidates for the Vermont Senate do not hire paid campaign managers.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates."

82. Most candidates for the Vermont House do not hire any paid campaign staff.

RESPONSE: Plaintiffs are unable to admit or deny, as they do not know the practices of "most candidates." Plaintiffs believe the matter is most likely true.

*****

84. Campaigns for election to the Vermont House have been more focused on in-person contact with voters than on television and radio advertising.

RESPONSE: Plaintiffs are unable to admit or deny as they do not understand the meaning of "more focused on". Plaintiffs admit that few Vermont House races have in the past used television advertising.

85. Campaigns for election to the Vermont Senate have been more focused on in person contact with voters than on television an radio television.

RESPONSE: Plaintiffs are unable to admit or deny as they do not understand the meaning of "more focused on". Plaintiffs admit that few Vermont Senate races have in the past used television advertising.

*****

87. Television cable companies offer public access channels in many Vermont communities.

RESPONSE: Admitted.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibit AA; 2d Cir. Trial Exhibits Volume III:E-1068-88]

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
BURLINGTON DIVISION

MARCELLA LANDELL, et al. *Plaintiffs,* *v.* WILLIAM H. SORRELL, et al. *Defendants.* and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al. *Defendant - Intervenors* and NEIL RANDALL, et al. *Plaintiffs,* *v.* WILLIAM H. SORRELL, et al. *Defendants.* and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al. *Defendant-Intervenors*	No. 2:99-cv-146

LANDELL PLAINTIFFS' RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSIONS

The Landell Plaintiffs respond to Defendants' Requests for Admissions as follows:

*****

3. Measured by population, House districts in Vermont are the second smallest in the country.

RESPONSE

Admit

*****

47. The lower spending limit for incumbents in 17 V.S.A. § 2805a helps offset the advantages that incumbents have been thought to enjoy in elections.

RESPONSE

Plaintiffs admit that this specific provision, taken alone, may have this effect. Plaintiffs deny that this effect will necessarily offset countervailing effects from other aspects of the challenged statutes.

48. The spending limits in 17 V.S.A. § 2805a will allow candidates in Vermont to spend less time attempting to raise campaign funds than would be the case if spending were unlimited.

RESPONSE

Plaintiffs admit that this specific provision, taken alone, may have this effect. Plaintiffs deny that this effect will necessarily offset countervailing effects from other aspects of the challenged statutes.

49. Most candidates for the Vermont House of Representatives do not use television advertising in their campaigns for election.

RESPONSE

Admit

*****

51. Although 86% of Vermont House candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 7% of Vermont House candidates did so in 1996, and 9% did so in 1998.

RESPONSE

Admit

52. Although 87% of Vermont Senate candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of Vermont Senate candidates did so in 1996, and 3% did so in 1998.

RESPONSE

Admit

53. Although 90% of candidates for Vermont statewide office filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of candidates for Vermont statewide office did so in 1996, and none did so in 1998.

RESPONSE

Admit

54. Voluntary spending limits have not been adhered to by most candidates for state office in Vermont in the last two election cycles.

RESPONSE

Admit

*****

80. Most candidates for the Vermont House do not hire paid campaign managers.

RESPONSE

Admit

81. Most candidates for the Vermont Senate do not hire paid campaign managers.

RESPONSE

Admit

82. Most candidates for the Vermont House do not hire any paid campaign staff.

RESPONSE

Admit

83. Most candidates for the Vermont Senate do not hire any paid campaign staff.

RESPONSE

Admit

84. Campaigns for election to the Vermont House have been more focused on in-person contact with voters than on television and radio television.

RESPONSE

Plaintiffs object that this request is vague and ambiguous in that it provides no standard for evaluating how a campaign has been "more focused," and also requests a broad categorization of numerous diverse campaigns. Subject to this objection, Plaintiffs admit that some of these campaigns may have been more focused on in-person contact with voters than on television or radio advertising, but deny that all of them have been focused in such a manner.

85. Campaigns for election to the Vermont Senate have been more focused on in-person contact with voters than on television and radio advertising.

RESPONSE

Plaintiffs object that this request is vague and ambiguous in that it provides no standard for evaluating how a campaign has been "more focused," and also requests a broad categorization of numerous diverse campaigns. Subject to this objection, Plaintiffs admit that some of these campaigns may have been more focused on in-person contact with voters than on television or radio advertising, but deny that all of them have been focused in such a manner.

*****

87. Television cable companies offer public access channels in many Vermont communities.

RESPONSE

Admit

*****

89. There are methods of communicating with voters in Vermont that do require any expenditure of money.

RESPONSE

Admit

90. Door-to-door campaigning in Vermont for election to the Vermont House does not require any expenditure of money.

RESPONSE

Plaintiffs admit that some door-to-door campaigning does not necessarily require an expenditure of money, but deny that door-to-door campaigning never requires an expenditure of money.

91. Door-to-door campaigning in Vermont for election to the Vermont Senate does not require any expenditure of money.

RESPONSE

Plaintiffs admit that some door-to-door campaigning does not necessarily require an expenditure of money, but deny that door-to-door campaigning never requires an expenditure of money.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibit BB; 2d Cir. Trial Exhibits Volume III:E-1089-93]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

NEIL RANDALL et al,
Plaintiffs

v. Docket No. 2:99-cv-234

WILLIAM H. SORRELL, et al.
Defendants
and
MIKE FIORELLO, et al.
Defendant-Intervenors

MARCELLA LANDELL, et al.

v.

WILLIAM H. SORRELL, et al. Docket No. 2:99-cv-146
Defendants
and
MIKE FIORELLO, et al.
Defendant-Intervenors

[Randall] PLAINTIFFS' AMENDED AND SUPPLEMENTAL RESPONSES TO DEFENDANTS' REQUESTS FOR ADMISSIONS

NOW COME the Plaintiffs, Neil Randall, et al., through their attorneys, and amend and supplement

their Responses to Defendants' Requests for Admissions, dated January 14, 2000 as follows:

51. Although 86% of the Vermont House candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 7% of Vermont House candidates did so in 1996, and 9% did so in 1998.

RESPONSE: Admitted

52. Although 87% of Vermont Senate candidates filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of Vermont Senate candidates did so in 1996, and 3% did so in 1998.

RESPONSE: Admitted.

53. Although 90% of candidates for Vermont statewide office filed affidavits promising to adhere to the voluntary limits on campaign spending in 1994, only 16% of candidates for Vermont statewide office did so in 1996, and none did so in 1998.

RESPONSE: Admitted.

54. Voluntary spending limits have not been adhered to by most candidates for state office in Vermont in the last two election cycles.

RESPONSE: Admitted.

*****

[U.S. Dist. Ct., Dist. of Vermont, Exhibits U-1, U-2, U-3; 2d Cir. Trial Exhibits Volume III:E-0938-98]

Expert Report of Anthony Gierzynski

Landell v. Sorrell Docket No. 2:99-cv-146

And

Randall v. Sorrell Docket No. 2:99-cv-234

Date: March 13, 2000

/s/
Anthony Gierzynski, Ph.D **[*2]**

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I. Personal Background

I am an associate professor of political science (with tenure) at the University of Vermont. I have been a professor at the University of Vermont for over seven academic years. Prior to that I held a research position at the Social Science Research Institute at Northern Illinois University. I earned a doctorate in political science at the University of Kentucky in 1989. I am a nationally recognized scholar on the financing of campaigns, especially state legislative campaigns.

As indicated in my curriculum vitae, my areas of academic expertise are campaign finance, elections, and political parties. Since 1989, I have authored two books and authored or co-authored about a dozen academic articles and book chapters related to the subject of financing elections. The second and most recent book, *Money Rules: Financing Elections in America*, has just been published (in January 2000). Additionally, I have been the co-principle investigator on grants from the National Science Foundation and the Joyce Foundation for the purpose of studying campaign finance at the state and local level. The project funded by the National Science Foundation involved a group of scholars collecting campaign finance revenues from 18 states over 4 election cycles. The Joyce Foundation funded project was a study of the financing of city elections in Chicago, Illinois.

I have been retained as an expert in this matter by counsel for the defendants and defendant-intervenors at a rate of $100 per hour. I previously served as an expert for the state of Vermont on the issue of campaign finance in *Vermont Right to Life Committee, Inc. v. Sorrell* (docket no. 2:97-cv-286) **[*4]**.

II. Introduction

The purpose of this report is to examine the effect of

Vermont's campaign finance law – enacted by the legislature in 1997 under "An Act Relating to Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures" – on campaigns for state offices. More specifically, I will explore the impact the Act's contribution and expenditure limits may have on candidates' and committees' ability to communicate with voters by examining campaign contribution and expenditure patterns in recent Vermont elections.

The 1997 Act provides public funding for candidates running for governor and lieutenant governor. It limits the amount a person, organization, party, or committee may contribute to a candidate, committee, or party. It limits the amount candidates can spend on their campaigns, with lower expenditure limits for incumbent candidates. And, it limits out of state contributions to a total of no more than 25% of a candidate's revenue. In Figure 1 I summarize relevant aspect of the new law.

[Figure I About Here]*

*[Editing Note: This and following bracketed references to Figures/Tables were in the original report, but the Figures/Tables were appended to the report as here.]

Prior to the adoption of the 1997 legislation, individuals, organizations, and committees could give up to $1,000 to a candidate per election. The legislation limits those contributions to $400 to statewide offices, $300 to state senate candidates, and $200 to state house candidates (all limits cover a two-year general election cycle). Prior to the new legislation, there was no limit on out-of-state contributions, no limit on the amount that could be contributed to political party organizations, no limit on the amount that political party organizations could contribute to candidates, and there was a system of voluntary limits on campaign spending. The Act limits

out-of-state contributions to 25% **[*5]** of a candidate's total revenue. It limits the amount an individual or organization can contribute to political parties to $2,000 in a two-year general election cycle. It limits the amount that party organizations may contribute to their candidates to the amount allowed individuals and political committees. The legislation limits expenditures by nonincumbent gubernatorial candidates to $300,000, lieutenant governor candidates to $100,000, and the other statewide offices to $45,000. Incumbents are allowed to spend only 85% of those limits. Candidates for the state senate are allowed to spend $4,000 (plus $2,500 for each additional seat in the district) and state house candidates are allowed to spend $2,000 ($3,000 if the candidate is running in a two-member seat). Incumbent senate and house candidates are allowed to spend 90% of those limits. Before turning to the analysis of the effects the limits in the 1997 law may have on candidates, political committees, and political parties, it is important to discuss the context in which the new law will operate, that is, Vermont's history with regard to regulating campaign finance and the nature of elections in this state.

A review of Vermont's history that the 1997 Act is not a unique occurrence; indeed Vermont has had a history of regulating campaign finance behavior. In 1916 Vermont voters approved (in a referendum) a primary election and corrupt practices act that had been passed by the legislature in the previous year.[1] The law established a fine for purchasing votes and required that primary candidates file campaign finance reports with

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[1]The material on the history of campaign finance law in this paragraph comes from Paul S. Gillies article, "The Disinfecting Light: The Public Disclosure of Campaign Finances," in *We Vermonters: Perspectives on the Past*, Michael Sherman and Jennie Versteeg, editors (Montpelier, VT: Vermont Historical Society, 1992).

the state. In 1961 the state set campaign spending limits for primary candidates (the Republican dominance of state politics at the time meant that the primary, **[*6]** not the general election, was the determining contest and thus the one that needed regulation).[2] The $7,500 expenditure limits established in that act lasted until the state revised the law in 1972. In 1972 the legislature enacted a law that limited contributions from "a single source, except a contribution from a political party" to $1,000.[3] It limited contributions made to political parties to $1,000. And, it limited gubernatorial candidates' expenditures to $40,000 per election and other candidates to $20,000 per election.[4] The 1972 spending limits were repealed in response to the Supreme Court's *Buckley* decision. In 1982, 1986, and 1988 the legislature made minor changes in the law, mainly concerning disclosure requirements.[5]

Whereas the acts of the legislature and the public show Vermonters have long been concerned over the corrupting influence of money in the state's politics, Vermont has been and still is a state where candidates can be successful without spending large sums of money. Unlike elections in many other states, elections in Vermont are contests where candidates of lesser financial means can still effectively communicate with voters and win. This is due largely to the small size of the state and the low costs of campaigning here. Vermont ranks 49th

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[2]Public Act 178 – "An Act to Limit the Amount That May be Spent by and for a Candidate for Public Office in a Primary Election for State Office."

[3]Public Act 259 – "An Act to Add 17 V.S.A. Chapter 36 Relating to Limitations on Election Expenses in Primary and General Elections."

[4]Public Act 259.

[5]Paul S. Gillies, "The Disinfecting Light: The Public Disclosure of Campaign Finances."

out of the 50 states in population.[6] It is served by a relatively inexpensive media market. Smaller media market stations (media markets are ranked based on the number of TV viewing households) charge less for advertising **[*7]** and the Burlington-Plattsburg media market is ranked 91st nationally; for sake of comparison, Boston is 6th.[7] Because of its small size and culture of intimate, participatory politics, elections are not dominated by media-centered battles as they are in larger states, including our neighbor to the west. "Retail politics" still dominates in Vermont; most candidates' electoral fortunes are heavily dependent on one-on-one contact with voters in door-to-door campaigning. As one former prominent state politician put it,

> A massive war chest isn't necessary, nor does there have to have an entourage of help to get elected. If someone dedicates approximately seven weeks of work, a minimum of brain labor, and a budget that can reach as low as a couple of hundred dollars he or she can, everything else considered get elected. . .
>
> The major component of any successful campaign is basic person-to-person contact. That is necessary no matter what office a person runs for or from what area they are running.[8]

State house candidates campaign in districts with populations of either slightly under 4,000 (for single member districts) or just under 8,000 (for two-member

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[6]U.S. Census Bureau, http://www.census.gov/population/estimates/state/st-99-1.txt.

[7]*Television & Cable Factbook* (Washington, D.C.: Television Digest, Inc., 1999).

[8]Ralph Wright, *All Politics is Personal* (Manchester Center, Vermont: Marshall Jones Company, 1996), p. 233.

districts). Only New Hampshire has legislative districts with smaller populations.[9] The typical number of voters in these districts is smaller – once considering those of voting age and the level of voter turnout. The average number of votes received by winning candidates in single-member house districts in 1998 was 1022 (1585 for winning candidates in two- [*8] member districts). With such small districts it is feasible to contact enough voters personally, making money unimportant. This is reflected in the fact 55 of the 150 victorious state house candidates in 1998 (36.7% of all House winners) did not raise or spend above the $500 threshold for filing a campaign finance report. Only about 14% of house winners (in both single-member and two-member districts) spent more than $2,000. Among these low spending winners were a significant number of winning challengers (9 in all), such as George Cross and Kenneth Atkins who both beat out an incumbent for the Chittenden-1-3 district while not spending or raising enough to need to file a campaign finance report.

State senate districts are larger than house districts, with about 19,600 constituents per senator (so 2 member senate districts would have twice that amount; Chittenden County, the largest with 6 seats has a population of approximately 117,800). These senate districts, however, are still at the bottom end of district size in the U.S. Going door to door is still a crucial element of Senate campaigns. Media campaigns, especially television, are not efficient in most senate districts because of the lack of congruence between media markets and district boundaries (because candidates purchasing media time pay to reach many voters that are not in their

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[9]Anthony Gierzynski, "Elections to State Legislatures," in *Encyclopedia of the American Legislative System*, ed. Joel H. Silbey (New York: Scribner's, 1994), pp. 436-437.

districts).

For statewide candidates, campaign expenditures and mass media buys are more important, but not the most important factor in a candidate's success. The relatively small size of Vermont (its population is smaller than the population of one *state* senate district in California) means direct contact with voters is still important, as are voter **[*9]** mobilization programs run by the political parties.[10] Additionally, media organizations within the state – especially Vermont Public Radio, WCAX-TV and WPTZ – provide statewide candidates with many forums that allow the candidates to communicate substantive and unfiltered messages to the Vermont public for free.

This culture of "intimate politics" is reflected in the small amounts of money spent in Vermont campaigns over the past 3 election cycles. In Table 1 I present the expenditure levels for major party candidates for governor and lieutenant governor and the mean and media expenditures for major party candidates for the other statewide offices and state legislative candidates in the 1994, 1996 and 1998 general election. The winning candidate for governor spent under $200,000 in the 1994 and 1996 campaigns, and $435,237 on his 1998 campaign. One political scientist's analysis of the average costs of gubernatorial campaigns in the 50 states, found Vermont to rank 49th (spending analyzed between 1978 and 1993).[11] Spending by candidates for lieutenant governor averaged about $115,000. Two of these races were extremely competitive. The average for the other state-

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[10]A large part of the Democrats' electoral success in 1998 was the voter identification and mobilization program run by the state party.

[11]Thad Beyle, "Governors: The Middlemen and Women in Our Political System," in *Politics in the American States: A Comparative Analysis* (sixth edition) eds. Virginia Gray and Herbert Jacob (Washington: Congressional Quarterly Press, 1996), pp. 216-217.

wide races all were under $30,000 with the exception of the losers in 1998.

In terms of house campaigns, it is important to note that 35.5 percent of state house candidates in 1998 did not file campaign finance reports, meaning they did not receive or expend any amounts in excess of $500 (the threshold over which one is required to file a report). For purposes of this analysis, those non-filing candidates were **[*10]** assigned expenditures of $500, thus conservatively inflating the averages over what is probably actually spent. The average winner and loser in house campaigns spent well under $2,000 in all three elections.

Given the nature of Vermont elections the campaign finance regulatory system established by the 1997 Act appears quite reasonable. (This initial impression is born out by the more rigorous and detailed analysis to follow.) The expenditure limits and contribution limits are proportionate to the amount of financial activity that takes place within the state's elections. Sums lost to the fact that a candidate must take smaller checks can be easily made up for by other contributors (or by couples writing separate checks). This is most obvious with house contests. An average house candidate needs only 6 contributions of the $200 maximum to fund a campaign. But it is also true for other races as well. For the most expensive race, the gubernatorial race, the $400 limit means candidates in the 1998 election would have had to solicit 632 to 1,089 contributions at that level to have raised as much as they spent (632 contributions for Dwyer, 1,089 for Dean). The 1,089 contributions Dean would have had to raise are in comparison to the 1,684 contributions he actually collected for the 1998 election.

Under the previous law, the $1,000 limits left Vermont susceptible to growing interest group influence – a few interests could easily fund most legislative campaigns (2 would do for state house campaigns under the

old law). Such a dependence on so few sources for campaign funding leads to questions about the independence of representatives from those donors' interests. **[*11]**

III. Methodology

The analysis that follows is based on campaign finance reports filed with the Vermont Secretary of State's Office for the 1994, 1996, and 1998 elections. I constructed data files with the assistance of students at the University of Vermont.[12] The files included relevant candidate electoral information – votes, incumbency, district, etc. – total contributions (as best ascertained from the candidates' and committees' last report or from totaling itemized and non-itemized contributions), total expenditures (as best ascertained from the candidates' and committees' last report or from totaling itemized expenditures), itemized contributions, and itemized expenditures. Data cover the two-year election cycle for each election. Much of the analysis focuses on major party candidates since third party candidates or independents failed to raise or spend much during the 1994 to 1998 elections.

It should be noted that the analysis that follows is based on a worst-case scenario. By projecting previous patterns of campaign finance behavior onto future elections, the analysis assumes that there will be no adjustments in fundraising techniques or in patterns of giving under the new law. This results in estimates of the effect of the new law that may overstate the law's burden on candidates and contributors since it is quite evident

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[12]The National Institute on Money in State Politics computerized the 1998 contributions to candidates under the supervision of Samantha Sanchez. I read these data using SPSS/PC, checked and cleaned the data for my purposes (the data was accurate and complete), and aggregated the multiple contributions made to one candidate.

from the history of campaign finance regulation that candidates and campaign committees adapt quickly to changes in campaign finance law. Other, more specific assumptions that are made during the analysis follow the same principle. For example, **[*12]** candidates who did not file campaign finance reports are assumed to have raised and spent $500 on their campaign, which is the maximum they could raise or spend without being legally required to file a report of the campaign finance activity.

IV. Contribution and Out of State Limits: Data Analysis

The questions that arise from the limits on contributions enacted in the 1997 law are 1) whether the limits hinder candidates' ability to raise funds and thus their ability to communicate with voters, and 2) whether those limits have a significant impact on most donors' contributions. This section examines the contribution patterns in the 1994, 1996, and 1998 elections in order to answer these questions. Based on previous patterns, the analysis does find that the 1997 Act will have a minimal effect on both candidates' ability to raise funds and on individuals' and committees' ability to give to campaigns.

To analyze the effect of the law on contributions, I aggregated multiple contributions from each source to candidates, parties, or committees. Contributions from couples were **not** divided in two, even though under the 1997 Act a couple that made an $800 contribution to a candidate for statewide office in the past could contribute $400 each in 2000 and thus see no reduction in their ability to give. This decision thus overestimates the assessment of the impact of the contribution limits. Contributions from the candidate themselves were not included in the analysis as the contribution limits do not apply to such contributions. No attempt was made, however, at identifying immediate family members that

may have contributed; this, again, will overestimate the impact of the limits. Since political party contributions were previously unlimited, the analysis will, in places, treat party contributions separately. **[*13]**

To assess the impact the Act's contribution limits may have on candidate financing, one can compare past contributions with the new limits. Overall, only a small proportion of contributions made during the last three elections would have been affected by the new limits that are established under the 1997 Act. Table 2 lists the number and percent of contributions in the past three elections that were in excess of the new limits for statewide candidates, senate candidates, house candidates, party committees, and political committees. The percentage of all contributions received by statewide candidates in the past three elections that were greater than the new limits never got as high as 10%. The percentage of all contributions received by senate and house candidates were well below 10% in 1994 and 1996. In 1998 the percentage increased to 17.2% for senate candidates and 11.9% for house candidates, mainly due to a large increase in party funding activity that year. Party organizations and political committees receive an extremely small percentage of their contributions in excess of the new limits – 2.4% for parties and 0.6% for political committees in 1998.

If we exclude party contributions from the analysis – since political parties operated under no contribution limits in these elections – the percentage of contributions greater than the limit is smaller, especially in the case of senate and house candidates in the most recent election. The percentage of nonparty contributions over the limits for senate candidates in 1998 was 14.2% and for house candidates 6.5%.

Thus, looking at the overall pattern of contributions it is clear that the contribution limits set by the legisla-

ture in 1997 would affect only a small percentage of contributors.

[Table 2 About Here] **[*14]**

A. Effect of Contribution Limits on Statewide Candidates' Finances

In Tables 3 through 5 I show the effect of the contribution limits on the finances of statewide candidates. The tables list the number of contributions from individuals and committees that exceed the new limits, the percent of those contributions that exceeded the limits,[13] the amount in excess of the limits (calculated by subtracting the limit from the large contributions and summing the results), and the percent of a candidate's revenue represented by the amount in excess of the contribution limits.[14]

[Table 3 About Here]

Of all of the contributions received or solicited by candidates from individuals and political committees, only a small proportion would have exceeded the limits. In the most expensive campaign of 1998 – the gubernatorial race – 7.8% of Howard Dean's and 13.4% of Ruth Dwyer's contributions exceeded the limits. Only 2 of the

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[13]To calculate the percent of contributions over the limits, I divided the number of contributions over the limit by the total number of itemized contributions plus an estimate of the unitemized contributions. I estimated the number of unitemized contributions by subtracting the total of itemized contributions from the candidates' total revenues and then dividing that total by 100 (the level at which contributions must be itemized). This method of estimating unitemized contributions is a conservative one since it is highly unlikely that all contributions that were not itemized were as large as $100, thus the method undoubtedly underestimates the number of unitemized contributions.

[14]For these calculations, candidate's revenue included amount raised during the election cycle and excluded the amount a candidate carried over from a previous campaign.

11 major candidates for statewide office in 1998 received more than 10% of their contributions in amounts over the 1997 limits – Dwyer and Snelling. None of the third party or independent candidates received any contributions larger than the contribution limits. A similar pattern is found in the 1996 election with only one candidate getting greater than 15% of his contributions in large contributions – John Carroll whose large contributions constituted 15.6% of all his contributions. Only one of the minor candidates received any **[*15]** money in an amount over the limit – St. John had one contribution that was $100 over the limit. In 1994 the percentages of contributions exceeding the limit appears high for a few candidates – 25.4% for Kelly, 40.5% for Hooper, and 43.3% for Flanagan – due mainly to the fact that these candidates apparently did not solicit many contributions; this point is evident by looking at the absolute number of large contributions – 15 for Kelly, 28 for Hooper, and 13 for Flanagan. Again, no third party candidate or independent received any contributions over the contribution limit in 1994.

Thus the number and percentage of contributions received by statewide candidates that would have been affected by the 1997 law are small. Tables 3 through 5 also show the amount of funds raised over the limits and what percentage of a candidate's revenue those funds represent. Here we see much more variation among candidates. For Governor Dean, for example, the amount of money raised over the limits have constituted from 47.6 to 33.1% of his revenues in the past three elections. This is due in large part to the large sums of money the governor has raised out of state from his colleagues in medicine and from other interests around the country; a result that may be tied to his interest in national office. (A national network of contributors is also partly responsible for Ed Flanagan's reliance on large contributions).

Many of the candidates for other offices – including many of those who won – received a smaller portion of their funds in amounts in excess of the 1997 limits. Only 14.3% of Deb Markowitz's funds in her successful campaign against incumbent Secretary of State James Milne came in amounts over the limits. A little over 20% of the funds raised by Doug Racine in his close contest with the well-known Barbara Snelling were from amounts above the limits. (It is **[*16]** important to note again that family contributions were not excluded from these data, consequently the numbers are a bit inflated.)

In reviewing these numbers, one must keep in mind that the incentives under the old law were such as to encourage large contributions. Since it simply made sense to raise the largest contributions possible under the old law, the best way to judge the impact of the new limits is to ask the question, Can a candidate successfully win office while raising revenue in exclusively small contributions? The case of Deb Markowitz clearly demonstrated that it is possible to run an effective campaign raising money in mostly small amounts. Only 3.1% of her contributions exceeded the new $400 limit. $7,500 of her revenue, or 14.3% of her total revenue, was from amounts over the limit (it would take a mere 19 contributions at the $400 limit to replace that amount). And, without any previous electoral experience she unseated an incumbent candidate in a close race. Clearly, she was able to communicate her message to Vermont voter while following campaign finance practices not far from what the 1997 Act specifies. Because she defeated an incumbent in a race for an office that does not garner much attention from the media or the voters, her case represents the best example of how a candidate can win while raising money in small amounts. It should also be noted that Barbara Snelling won the close open-seat race for lieutenant governor in 1994 with less than 15% of her funds coming

from money in excess of the contribution limit.

B. Effect of Contribution Limits on State Legislative Candidates' Finances

Tables 6 through 9 present a number of ways of assessing the possible impact of the 1997 contribution limits on state house and senate candidates. No matter how one **[*17]** looks at these data, it is clear that the $300 contribution limit for senate candidates and the $200 contribution for house candidates will not have any noticeable effect on the ability of legislative candidates to raise funds for their elections and communicate with voters.

The effect of the limits on senate and house candidates' revenues would be minimal. Tables 6 and 7 show the candidate total expenditures and revenues, the sum of the amounts raised over the limit, the percentage of revenues candidates would lose due to the limits, and the average amount of revenues lost to the limits, and the average amount lost per contribution in excess of the limits. The percentage of revenue affected by the limits for senate candidates would have been 10.1% in 1994, 10.8% in 1996, and 18.2% in 1998. The average amounts lost were $577 for 1994, $677 for 1996, and $1,650 for 1998. The percentage of revenue affected by the limits for house candidates was 3.2% in 1994, 5.2% in 1996, and 6.5% in 1998. The average amount affected: $32 in 1994, $42 in 1996, and $115 in 1998. These numbers suggest that the 1997 Act's limits would affect a small and replaceable part of senate and house candidates' revenues.

[Tables 6 and 7 About Here]

There appears to be no systematic difference between incumbents and nonincumbents with regard to the impact of the new contribution limits. In senate contests, challengers relied on more contributions over the limit

than incumbents in 1998 (20.7% of nonincumbents' revenues would have been affected by the limits, 15.5% of incumbents), but in 1996 and 1994 the differences were minimal (a difference of 0.1% in 1996 and 0.4% in 1994). In house races incumbents relied more on large contributions in 1998 and 1996 (with 8% of their revenues over the limit compared to 5.5% of **[*18]** nonincumbents in 1998, and 6.3% compared to 2.9% in 1996) while nonincumbents relied more on large contributions in 1994 (1.5% for incumbents compared to 4.8% for nonincumbents).

Given the pattern of the past three elections, the contribution limits appear to be likely to affect more of the revenues of Democrats and Progressives than Republicans. In two of the three election cycles for senate races and all three of the election cycles for the house, Democrats relied on more money that exceeded the new limits than Republicans. In 1998, for example, 25.5% of Democratic senate candidates' revenues were in amounts in excess of the limit whereas 12.3% of Republican senate candidates' revenues were. In house contests in 1998 8.3% of Democratic candidates' revenues, 5.5% of Republican candidates' revenues, and 10.5% of Progressive candidates' revenues came from amounts in excess of the contribution limits.

Tables 8 and 9 show the number and percent of candidates with the number of the contributions that would have been affected under the new limits in the past three election cycles. Thirty senate candidates (or 39.5% of senate candidates) in the 1998 election cycle had no contributions that exceeded the new $300. Over ½ of senate candidates (52.6%) had 2 or fewer contributions that would have exceeded the new contribution limits. For house candidates, 203 (or 73.6%) of the house candidates in 1998 had no contributions that exceeded the new $200 limit. 85.9% of house candidates received at most 1

contribution over the $200 amount. These patterns show that it is unlikely that many candidates will have a significant number of contributions that will be affected by the new contribution limits.

[Tables 8 and 9 About Here] **[*19]**

However one looks at the patterns of fundraising for house and senate candidates in the past three election cycles, it is evident that the impact of the 1997 Act on these candidates' ability to raise sufficient funds for their campaigns will be minimal. The data from the previous elections show that the money that would be lost under the contribution limits of the 1997 Act constitutes a small enough portion of house and senate candidates' funds that replacing the revenue from these large contributions should not pose a difficulty for candidates.

C. Effect of Contribution Limits on Contributors

In Tables 10 and 11 I examine the impact of the contribution limits on a number of different classifications of contributors to statewide and legislative campaigns over the past three election cycles. Because no information is available regarding unitemized contributions, the analysis in the table is of itemized contributions only; consequently, the numbers will be higher than what they would be if it were possible to include all contributors. "Individual" contributors are all contributors identified by a personal name, regardless of affiliation. "Business" contributors are individual businesses. "Political committee" contributors include all political action committees, associations, and labor unions. "Party organization" contributors are contributions from national, state, and local party organizations.

[Tables 10 and 11 About Here]

The results that stand out most from both tables are

the small number and percentage of contributions from individual citizens that exceed the limit. Among contributions to statewide candidates, only 7.9%, 14.8%, and 12.5% of individual contributions in 1998, 1996, and 1994 exceeded the $400 limit. The average amount **[*20]** over the limit during those elections was $43, $87, and $62. The relatively higher percentage of revenues over the limit in combination with the numbers just mentioned is indicative of a few individual contributors giving large amounts. The number of contributions in excess of the limits that went to legislative candidates is smaller in each year than the number going to statewide candidates, though these contributions constitute a slightly higher percentage of all contributions made – 18.9%, 23.8%, and 18.3% in 1998, 1996, and 1994, respectively. Clearly, the patterns in the previous election cycles show that new limits will not impose a burden on the ability of most citizens to contribute to campaigns.

D. Burlington Mayoral Race

While the analysis of the effect of the limits on statewide and legislative candidates depends on applying the contribution limits to past elections under the old $1,000 limits, at least one major race has occurred since the contribution limits took effect, i.e. the Burlington mayoral race. Under the 1997 Act, candidates for local offices are faced with the same contribution limits as candidates for the state house. A comparison of the amounts raised by mayoral candidates in the largest city in the state between 1997 (before the new limits took place) and 1999 (when the $200 limit on contributions applied) suggests that the limits will not be detrimental to candidates' ability to raise sufficient money to communicate with voters. In 1997 the total amount raised by candidates for mayor was $10,823, in 1999 the total

raised was five times that amount, or $58,025.[15]

E. Missouri Limits versus Vermont Limits [*21]

In *Missouri v. Shrink Missouri Government PAC* (2000) the U.S. Supreme Court recently upheld contribution limits in Missouri that ranged from $1,075 per election for statewide candidates to $275 per election for state house candidates. In Table 12 I compare the recently upheld Missouri limits with the Vermont limits by looking at the two states' contribution limits in light of the size of the constituency (since Missouri's limits are per election, I've doubled the size of the contribution limit to make them comparable to Vermont's election-cycle limits). The size of the constituency gives us an indication of the amount of voters that a candidate would have to reach during his or her election campaign. The ratio of contribution to constituency size gives us an idea of the size of possible contribution vis-a-vis the size of the campaign necessary to reach enough voters. It is clear from looking at the ratio of the limit to the size of the constituency that Vermont's limits are more generous than Missouri's. For statewide races, the ratio of the contribution limit to the size of the constituency for Missouri is .00040 compared to the .00068 ratio for Vermont. For state house districts, the ratios are .01673 for Missouri, .02564 for 2 member districts in Vermont. The ratios for the senate show that the contribution limits are more generous for senate candidates in single member districts, roughly equal for senate candidates in 3 member districts, and slightly less generous when compared to the Chittenden County 6-member senate district. Thus, relative to the size of the constituency – and thus size of the campaign that is necessary – Ver-

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[15]Totals taken from candidate's report filed with the Burlington City Clerk.

mont contribution limits (with the exception of the limit on Chittenden County senate candidates) are as generous or more generous than the Missouri limits recently upheld by the U.S. Supreme Court.

[Table 12 About Here] **[*22]**

F. Effect of Out of State Limit

The 1997 Act placed an aggregate cap on out-of-state contributions – contributions from outside of Vermont cannot exceed 25% of candidates' total revenues. In Tables 13 through 15 I present the proportion of statewide candidates' revenues coming from out of state.

[Tables 13 through 15 About Here]

The statewide candidates provide a wide variety of funding mixes, ranging from no money from out of state to 68.6% of revenues originating from beyond Vermont's borders. Two candidates – Howard Dean and Edward Flanagan – were consistently at the high end of the scale. Governor Dean raised 60.8, 52, and 42.3 percent of his money out of state in 1994, 1996, and 1998, respectively. Edward Flanagan's out of state percentages were 68.6, 44.7, and 66.3. Dean and Flanagan have extensive networks outside of the state that account for these numbers and appear to be unique in this regard. Most of the other statewide candidates' out-of-state revenues do not add up to the 25% limit and all but one of the minor party candidates from 1994 to 1998 received no money from out of state (one candidate received $28 from Nebraska). Additionally, plenty of victorious candidates have won while relying on only a small amount of out-of-state money. Only 19.5% of Ruth Dwyer's funds in 1998 came from out of state, 8.1% of Doug Racine's, and 16.8% of Dwinnell's. At 27.9%, Deb Markowitz's 1998 campaign raised just over the 25% mark out of state. As with the contribution limits, the question is whether there are successful candidates whose pattern of financing fits the

limits of the new law. It is evident from the past experience of statewide candidates as outlined in the three tables that many successful candidates did not need to raise much of their money **[*23]** from outside of Vermont. For example, in three election cycles of competitive races, no candidate for lieutenant governor would have exceeded the out of state limit: the average percentage raised from out of state in these three competitive races was 9.05%.

The impact of the 25% out-of-state limit on house and senate candidates will be minimal if they continue the fund raising practices of the past. This is evident in the average out-of-state contributions and the average percentage of revenues coming from out of state for house and senate candidate from 1994 to 1998. The average percentage of revenues from out of state for senate candidates in 1994 was 7.5%; it was 9% in 1996. It dropped to .9% in 1998.[16] The average percentage for house candidates was 1.7% in 1994, 2.6% in 1996, and 2.2% in 1998. In 1994 93.7% of senate candidates and 96% of house candidates raised less than 25% of their revenues from outside of Vermont. In 1996 it was 87.9% of senate candidates and 97.9% of house candidates. It is quite apparent that the out-of-state limit does not pose a burden on state legislative candidates.

[Table 16 About Here]

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[16]The 1998 "average % out of state" was calculated differently from the average for 1994 and 1996 due to data limitations. The 1998 average % is actually the % of total revenue raised from out of state sources for all candidates (not the average of the percentage for each candidate). Both methods result in similar numbers for 1994 and 1996. The 0.9% for 1998 senate candidates does represent a real drop in identifiable out of state contributions.

V. Expenditure Limits: Data Analysis

In the 1997 campaign finance Act the legislature set expenditure limits for statewide and legislative campaigns. To reflect the well-documented electoral advantage that incumbents accrue from their office, the amount incumbents are allowed to spend under the Act was set at 85% of the spending limit (90% for state house and senate incumbents). So, gubernatorial candidates can spend up to $300,000 during the election **[*24]** cycle, but incumbent governors can only spend $255,000. The limits for each office and the spending by statewide candidates are listed in Tables 17 through 19.[17]

For the three election cycles covered, 17 out of the 29 major party candidates for statewide office spent less than what the spending limits in the 1997 Act would allow. All of the third party candidates failed to spend anywhere near the level of the spending limits. Neither of the major party gubernatorial candidates spent in excess of the limits in 1994 and 1996. In the 1998 contest, Governor Dean exceeded the limit by $180,273 while his Republican opponent could have spent an additional $47,488 before reaching the expenditure limit. The major party candidates in the lieutenant governor races in all three election cycles, however, did exceed the limit.

[Tables 17 to 19 About Here]

The question, once again, is not how many candidates spent more or less than the limit, it is whether a candidate can mount a successful campaign by keeping their spending below the limits imposed by the new law. There are a number of cases that demonstrate that it is possible. Jim Milne unseated incumbent Secretary of State Don Hooper in 1994 while spending $26,733, an amount

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[17]Spending include in-kind contributions given to the candidate but excludes contributions candidates made to other candidates or committees and repayment of loans to the candidate themselves.

that was $18,276 below the new expenditure limits (and about $13,000 less than Hooper spent, see Table 19). Milne was later unseated by Deb Markowitz, who exceeded the limit only because of in-kind contributions (the actual spending of her campaign organization was less than the limit). Ruth Dwyer mounted a serious challenge to incumbent governor Dean in 1998 while **[*25]** spending almost $50,000 less than the new limits will allow. It appears that successful campaigns – of both incumbents and nonincumbents, Democrats and Republicans – are possible when the candidates' spending conforms to the expenditure limits enacted in the 1997 law.

With regard to legislative candidates, most candidates have typically spent less than the new limits. In tables 20 and 21 I present the total and average spending for senate and house candidates with separate data for candidates in different categories. The limits for the house and senate are sensitive to the size of the district in order to allow for the greater number of voters that must be reached. The legislature set the limit for house candidates in single member districts at $2,000 and for two-member districts at $3,000. The limits on senate candidates were set at $4,000 plus an extra $2,500 for every additional seat in the district. And, like statewide races, incumbents are allowed to spend less than those limits (90% of the limit in legislative races) in order to compensate for the advantages incumbents accrue from their position. Because the limitations on senate races are much more sensitive to the size of the district than the limits on house races, I compare average spending to the limits only by the number of seats in the district for senate. For house candidates, I select a number of lower limits to compare with the averages.

[Tables 20 and 21 About Here]

The spending patterns of senate candidates from 1994 to 1998 show that the spending limits will not be a significant constraint on senate campaigns. The average spending by major party candidates in all but the single member districts is below the spending limits for those districts. Senate candidates in 3 member senate districts in **[*26]** 1998, for example, spent on average $8,122, that is $878 below the spending limits set by the legislature in the 1997 Act. For the single member senate districts, the average candidate expenditure in 1994 was $229 over the limit. the amounts were higher in 1996 and 1998, but given the 1994 spending, one could believe successful campaigns in single member districts could be waged while adhering to the spending limits.

The average spending by different types of candidates is included in table 20 to determine whether the limits are more or less likely to affect a certain class of candidate. Incumbents spent more money in each of the three election cycles (reflecting the incumbency advantage in fundraising), though the difference is minimal in 1996. The average Republican senatorial candidate spent slightly more than the average Democrat in 1998, less in 1996, and significantly more in 1994. This lack of a clear pattern suggests the law will not benefit one party's candidates over another in senate races.

House candidates are even less likely to feel constrained by the expenditure limits given their pattern of spending in the previous three elections. In 1998, all categories of candidates for the house spent less than the spending limit. Incumbents spent, on average, $623 less than the strictest limit that could apply to them. Nonincumbents spent $493 less. Candidates in single member districts spent $474 less than the limit for their type of district, candidates in 2 seat districts spent on average $1,799 less than the spending limit. In 1996 only Progressive party candidates spent, on average, more

than the expenditure limit. In 1994 the average Republican and Progressive candidate spent more than the limit, and the average candidate in single member districts spent $10 more than the limit. **[*27]**

As with the senate candidates, the average for the different categories of house candidates suggests that no one group of candidates will suffer more under the new law – there are no consistent patterns of one group of candidates spending more than any other.

In sum, the pattern of spending in the past three elections clearly shows that the expenditure limits in the new law will have a minor effect on state house and senate candidates since most candidates typically have not spent more than what the new law will allow.

VI. Conclusion

The analysis of campaign finance activity in the 1994, 1996, and 1998 suggests that the new regulations established in 1997 under the title "An Act Relating to Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures" are workable for candidates and committees in state elections. The contribution limits are proportionate to the levels of spending that have been typical in the state: the limits do not make it difficult to raise the requisite cash for any of the state's campaigns. While some candidates have relied on larger contributions – which only make sense when such contributions are allowed – there have been many cases where candidates who relied mostly on small contributors have succeeded in winning office; their ability to communicate effectively with voters was not apparently hampered. Also, the patterns of giving over the past three elections suggest that the contribution limits will not affect the ability of most individual citizens to contribute to campaigns. The limit on out-of-state contributions will curtail candidates

who have come to rely on national networks of supporters, but it is evident that one can run a successful campaign fueled by mostly Vermont money. And, finally, while the [*28] expenditure limits would curtail some of the spending seen in recent years, most candidates, especially in house and senate races, have mounted successful campaigns spending well beneath the limits set by the law.

Figure 1: Summary of Vermont's Post 1997 Campaign Finance Law

Contribution Limits		
	Individuals and political committees	Political Party Committees
Governor	$400	$400
Lt gov	$400	$400
Secretary of State	$400	$400
State Treasurer	$400	$400
Auditor of Accounts	$400	$400
Attorney General	$400	$400
State Senate	$300	$300
State House	$200	$200
Political Party Committees	$2,000	$2,000
Political Committees	$2,000	$2,000
No more than 25% of candidate's money can come from out of state, including national political parties		

Expenditure Limits (2 year election cycle)		
	Challengers and open seat	Incumbents (85% of limit for other candidates)
Governor	$300,000	$255,000
Lt gov	$100,000	$85,000
Secretary of State	$45,000	$38,250
State Treasurer	$45,000	$38,250
Auditor of Accounts	$45,000	$38,250
Attorney General	$45,000	$38,250
State Senate	$4,000 + $2,500 for each seat	$3,600 + $2,250 for each seat (90% of challenger spending)
State House	$2,000 ($3,000 if 2-member dist)	$1,800 ($2,700 if 2-member dist) (90% of challenger spending)

Public Funding			
	Qualifying	Grant amount	
		Primary	General
Governor	At least $35,000 from at least 1,500 people in contributions of $50 or less	$75,000	$225,000
Lieutenant Governor	$17,500/750 people/$50 or less	$25,000	$75,000
Incumbents receive 85% of the grant total			

Table 1

Average Campaign Expenditures for Major Party Candidates

	1994		1996		1998	
	winner(s)	loser(s)	winner(s)	loser(s)	winner(s)	loser(s)
Governor	$183,300	$36,268	$191,203	$46,244	$435,273	$252,512
Lt. Governor	$115,719	$106,735	$138,418	$171,690	$114,538	$117,486
Other State-wide	$14,592	$25,719	$18,175	$26,886	$25,052	$39,773
Senate Races	$7,713	$4,121	$7,873	$6,278	$11,999	$5,556
House Races	$1,008	$1,594	$1,094	$1,068	$1,648	$1,453

Note: Figures are for major party candidates in the general election. For the purposes of this table, candidates who did not file a report were assigned an expenditure value of $500 (candidates are required to file a report if expenditures or revenues reach $500).

Table 2

Contributions Over Limit Received

	1994		1996		1998	
	all	nonparty	all	nonparty	all	nonparty
statewide candidates						
no. contributions over limit	378	371	420	413	519	505
% of contributions over limit	9.5%	9.3%	9.9%	9.8%	7.8%	7.6%
senate candidates						
no. contributions over limit	163	129	160	134	327	258
% of contributions over limit	6.0%	4.8%	4.7%	4.0%	17.2%	14.2%
house candidates						
no. contributions over limit	90	53	115	78	269	136
% of contributions over limit	3.5%	2.1%	5.4%	3.9%	11.9%	6.5%
party organizations						
no. contributions over limit	70	60	10	6	73	51
% of contributions over limit	0.1%	0.1%	0.1%	0.1%	2.4%	1.7%
political committees						
no. contributions over limit	2	2	3	3	6	5
% of contributions over limit	0.4%	0.4%	1.9%	1.9%	0.6%	0.5%

* 1994 party numbers excludes contributions made to the Democratic Governors' Association (DGA). It was excluded because while the DGA only contributed to 3 candidates in Vermont, the report filed by the DGA was its report for the entire nation; thus all but a few contributions listed in their report were from outside of Vermont.

Explanation: This table contains the number and percent of contributions that would have been over the new contribution limits. To calculate the percent of contributions over the limits, the number of contributions over the limit were divided by the total number of itemized contributions plus an estimate of the unitemized contributions. Unitemized contributions were estimated by taking subtracting the total of itemized contributions from the candidates' total revenues and then dividing that total by 100 (the level at which contributions must be itemized). This method of estimating unitemized contributions is a conservative one and undoubtedly underestimates the number of unitemized contributions.

Effect of Contribution Limits on Individual and Committee Contributions to 1998 Statewide Candidates

	vote %	# of nonparty Contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue raised*
Governor						
Dean (D)	55.7%	145	7.8%	$113,259	33.1%	$342,403
Dwyer (R)	41.1%	126	13.4%	$64,613	25.6%	$252,511
Rome (R)		57	4.3%	$27,875	12.9%	$216,289
Berkey (Lib)	0.9%	0	0%	$0	0%	$145
Gottlieb (Lib Union)	0.5%	0	0%	$0	0%	$0
Williams (VG)	1.5%	0	0%	$0	0%	$0
Lt. Governor						
Racine (D)	48.6%	28	8.8%	$24,921	21.5%	$115,838
Snelling (R)	48.1%	87	11.7%	$29,525	25.3%	$116,879
Faeterri (Lib)	0.6%	0	0%	$0	0%	$0
Newton (Lib Union)	0.7%	0	0%	$0	0%	$0
Coleman (VG)	1.8%	0	0%	$0	0%	$0
Secretary of State						
Markowitz (D)	47.8%	23	3.1%	$7,500	14.3%	$52,300
Milne (R)	45.2%	4	3.7%	$3,144	17.8%	$17,623
Richmond (Lib)	2.9%	0	0%	$0	0%	$100
Lane (VG)	3.9%	0	0%	$0	0%	$195
Treasurer						
Douglas (R/D)	85.4%	0	0.0%	$0	0	$9,948
Baker (Lib)	3.6%	0	0%	$0	0%	$0
Linskey (Lib Union)	4.7%	0	0%	$0	0%	$0
Bushey (VG)	6.0%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	52.2%	30	7.8%	$20,855	35.4%	$58,831
Dwinnell (R)	38.9%	15	9.6%	$8,408	22.4%	$37,505
Baker (Lib)	2.8%	0	0%	$0	0%	$142
Jackowski (Lib Union)	2.9%	0	0%	$0	0%	$0
Saetta (VG)	3.0%	0	0%	$0	0%	$0
Attorney General						
Sorrell (D)	83.8%	1	0.0%	$373	1.7%	$21,484
Costanzo (Lib)	4.5%	0	0%	$0	0%	$1,231
Fisher (Lib Union)	2.5%	0	0%	$0	0%	$0
Ward (VG)	8.8%	0	0%	$0	0%	$0

* "Total revenues raised" is the total revenue raised during the election cycle, it does not include balances carried forward from previous campaigns.

Note: Tables 3 through 5 include all nonparty contributions other than contribution a candidate makes to their own campaigns. Party contributions are not included in this analysis because party contributions were not limited at all in these elections and consequently the inclusion of party contributions would greatly skew the results for a few candidates. Dean and Dwyer, for example, would have had 50% and 41% of their revenues, respectively, over the limit if party contributions were included. On the other hand, the secretary of state candidates, Markowitz and Milne, would have had 16.8% and 19% of their revenues from amounts over the limit (minor changes from the numbers in the table).

Table 3A

Effect of Contribution Limits on All Contributions to 1998 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	55.7%	146	7.8%	$170,721	49.9%	$342,403
Dwyer	41.1%	127	13.4%	$103,013	40.8%	$252,511
Rome		57	4.3%	$27,875	12.9%	$216,289
Lt. Governor						
Racine	48.6%	29	8.8%	$58,883	50.8%	$115,838
Snelling	48.1%	87	11.7%	$43,126	36.9%	$116,879
Secretary of State						
Markowitz	47.8%	24	3.1%	$7,947	15.2%	$52,300
Milne	45.2%	5	3.7%	$3,344	19.0%	$17,623
Treasurer						
Douglas	85.4%	0	0.0%	$0	0	$9,948
Auditor of Accounts						
Flanagan	52.2%	30	7.8%	$20,855	35.4%	$58,831
Dwinnell	38.9%	16	9.6%	$13,008	34.7%	$37,505
Attorney General						
Sorrell	83.8%	1	0.0%	$373	1.7%	$21,484

Table 4

Effect of Contribution Limits on Individual and Committee Contributions to 1996 Statewide Candidates

	vote %	# of nonparty contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue Raised
Governor						
Dean (D)	70.5%	192	10.6%	$188,192	47.6%	$395,424
Gropper (R)	22.4%	17	12.2%	$6,500	14.2%	$45,698
Randall (Lib)	1.1%	2	14.2%	$150	1.5%	$10,284
Herbert (Lib Union)	1.6%	0	0%	$0	0%	$93
Lane (VG)	1.4%	0	0%	$0	0%	$480
St. John (I)	1.2%	1	25%	$100	12.9%	$775
Brunelle (Nat Law)	1.3%	0	0%	$0	0%	$0
Lt. Governor						
Racine (D)	54.0%	28	3.7%	$19,147	17.7%	$108,274
Carroll (R)	41.0%	108	15.6%	$49,050	27.9%	$176,052
Ngoima (Lib Union)	1.0%	0	0%	$0	0%	$0
Coleman (VG)	2.1%	0	0%	$0	0%	$206
Bate (Nat Law)	1.6%	0	0%	$0	0%	$0
Secretary of State						
Milne (R/D)	81.4%	1	0.1%	$800	26.4%	$3,035
Costanzo (L)	3.1%	0	0%	$0	0%	$310
Levy (Lib Union)	3.3%	0	0%	$0	0%	$0
De Pierro (VG)	7.4%	0	0%	$0	0%	$13
Wilder (Nat Law)	4.5%	0	0%	$0	0%	$0
Treasurer						
Douglas (R/D)	85.8%	0	0.0%	$0	0.0%	$8,583
Gottlieb (Lib Union)	3.5%	0	0%	$0	0%	$0
Bushey (VG)	7.0%	0	0%	$0	0%	$0
Bate (Nat Law)	3.4%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	49.6%	39	12.6%	$19,255	24.3%	$79,352
Morrissey (R)	39.1%	13	9.2%	$100	0.3%	$30,025
Baker (L)	2.3%	0	0%	$0	0%	$0
Davenport (Lib Union)	2.5%	0	0%	$0	0%	$0
Sweet (VG)	4.6%	0	0%	$0	0%	$0
McLaud (Nat Law)	1.5%	0	0%	$0	0%	$0
Attorney General						
Amestoy (R/D)	87.2%	4	9.3%	$3,400	37.3%	$9,110
Diamondstone (Lib U)	3.5%	0	0%	$0	0%	$0
Kingston (VG)	6.0%	0	0%	$0	0%	$0
Huston (Nat Law)	3.0%	0	0%	$0	0%	$0

Table 4A

Effect of Contribution Limits on All Contributions to 1996 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	70.5%	193	10.6%	$197,717	50.0%	$395,424
Gropper	22.4%	18	12.9%	$25,700	56.2%	$45,698
Lt. Governor						
Racine	54.0%	29	3.8%	$19,247	17.8%	$108,274
Carroll	41.0%	109	15.7%	$56,175	31.9%	$176,052
Secretary of State						
Milne	81.4%	1	0.1%	$800	26.4%	$3,035
Treasurer						
Douglas	85.8%	0	0.0%	$0	0.0%	$8,583
Auditor of Accounts						
Flanagan	49.6%	40	12.9%	$23,855	30.1%	$79,352
Morressey	39.1%	14	9.9%	$3,450	11.5%	$30,025
Attorney General						
Amestoy	87.2%	4	9.3%	$3,400	37.3%	$9,110

Table 5

Effect of Contribution Limits on Individual and Committee Contributions to 1994 Statewide Candidates

	vote %	# of nonparty contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	Total Revenue Raised
Governor						
Dean (D)	68.6%	218	12.0%	$174,501	47.4%	$368,117
Kelly (R)	19.0%	15	25.4%	$6,850	17.8%	$38,426
Gottlieb (Lib Union)	0.8%	0	0%	$0	0%	$0
Lane (VG)	1.0%	0	0%	$0	0%	$200
Brunelle (Nat Law)	0.7%	0	0%	$0	0%	$0
Jaccaci (People VT)	0.9%	0	0%	$0	0%	$0
Brueckner (I)	0.9%	0	0%	$0	0%	$0
Morse (I)	7.0%	0	0%	$0	0%	$1,339
Lt. Governor						
Snelling (R)	50.2%	72	7.9%	$21,950	14.7%	$149,813
Racine (D)	46.8%	21	4.0%	$14,835	16.8%	$88,185
Haas (Lib Union)	1.3%	0	0%	$0	0%	$0
Bate (Nat Law)	1.4%	0	0%	$0	0%	$0
Secretary of State						
Milne (R)	50.0%	2	1.6%	$581	3.1%	$18,946
Hooper (D)	42.1%	28	40.6%	$9,550	32.0%	$29,875
Herbert (Lib Union)	4.6%	0	0%	$0	0%	$0
Padilla (Nat Law)	3.0%	0	0%	$0	0%	$0
Treasurer						
Douglas (R/D)	91.4%	1	1.3%	$100	1.2%	$8,436
Ngoima (Lib Union)	3.6%	0	0%	$0	0%	$0
Schumacher (Nat Law)	4.8%	0	0%	$0	0%	$0
Auditor of Accounts						
Flanagan (D)	52.0%	13	43.3%	$5,775	39.1%	$14,770
Thorn (R)	38.5%	1	3.4%	$700	5.8%	$11,968
Davenport (Lib Union)	3.9%	0	0%	$0	0%	$0
McLaud (Nat Law)	1.7%	0	0%	$0	0%	$0
Redden (VG)	3.6%	0	0%	$0	0%	$0
Attorney General						
Amestoy (R/D)	87.1%	2	7.1%	$700	15.4%	$4,550
Diamondstone (Lib U)	5.5%	0	0%	$0	0%	$0
Mulchay (Nat Law)	3.7%	0	0%	$0	0%	$0
Talcott (VG)	3.4%	0	0%	$0	0%	$0

Table 5A

Effect of Contribution Limits on All Contributions to 1994 Statewide Candidates

	vote %	# of contributions over limit	% over limit	amount raised over limit	amount over as % of total revenue	total revenue
Governor						
Dean	68.6%	218	12.0%	$174,501	47.4%	$368,117
Kelly	19.0%	16	27.1%	$7,450	19.4%	$38,426
Lt. Governor						
Snelling	50.2%	72	7.9%	$21,950	14.7%	$149,813
Racine	46.8%	22	4.2%	$24,935	28.3%	$88,185
Secretary of State						
Milne	50.0%	2	1.6%	$581	3.1%	$18,946
Hooper	42.1%	29	42.0%	$9,550	32.0%	$29,875
Treasurer						
Douglas	91.4%	1	1.3%	$100	1.2%	$8,436
Auditor of Accounts						
Flanagan	52.0%	13	43.3%	$5,775	39.1%	$14,770
Thorn	38.5%	2	3.4%	$1,800	15.0%	$11,968
Attorney General						
Amestoy	87.1%	2	7.1%	$700	15.4%	$4,550

Table 6

Effect of Individual and Political Committee Contribution Limits on State Senate Candidates' Revenues

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost	Average lost per contribution
1998								
All candidates	$551,328	$7,450	$680,958	$9,202	$123,770	18.2%	$1,650	$107
Incumbents	$249,740	$8,919	$337,215	$12,043	$52,400	15.5%	$1,871	$130
Nonincumbents	$302,711	$6,441	$345,018	$7,341	$71,370	20.7%	$1,519	$95
Democrats	$229,523	$8,828	$266,485	$10,249	$68,066	25.5%	$2,618	$128
Republicans	$310,575	$9,705	$403,478	$12,609	$49,454	12.3%	$1,545	$88
1996								
All candidates	$492,064	$7,689	$496,076	$7,874	$53,478	10.8%	$677	$110
Incumbents	$144,802	$7,621	$153,015	$8,501	$17,474	11.4%	$874	$109
Nonincumbents	$324,600	$7,549	$315,758	$7,343	$35,704	11.3%	$626	$110
Democrats	$243,935	$8,131	$229,085	$7,636	$31,332	13.7%	$982	$142
Republicans	$222,359	$7,941	$236,473	$8,758	$21,344	9.0%	$689	$85
1994								
All candidates	$392,170	$5,853	$417,478	$6,844	$42,134	10.1%	$577	$63
Incumbents	$173,682	$8,271	$205,058	$10,793	$20,251	9.9%	$844	$81
Nonincumbents	$218,488	$4,750	$212,419	$5,058	$21,883	10.3%	$447	$52
Democrats	$150,337	$5,184	$145,895	$5,211	$16,806	11.5%	$542	$67
Republicans	$229,022	$8,179	$258,752	$9,952	$23,078	8.9%	$744	$59

Table 6A

Effect of Contribution Limits on All Contributions to State Senate Candidates

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost
1998							
All candidates	$551,328	$7,450	$680,958	$9,202	$192,287	28.2%	$2,564
Incumbents	$249,740	$8,919	$337,215	$12,043	$68,167	20.2%	$2,435
Nonincumbents	$302,711	$6,441	$345,018	$7,341	$124,120	36.0%	$2,641
Democrats	$229,523	$8,828	$266,485	$10,249	$75,266	28.2%	$2,895
Republicans	$310,575	$9,705	$403,478	$12,609	$106,571	26.4%	$3,330
1996							
All candidates	$492,064	$7,689	$496,076	$7,874	$74,222	15.0%	$940
Incumbents	$144,802	$7,621	$153,015	$8,501	$21,182	13.8%	$1,059
Nonincumbents	$324,600	$7,549	$315,758	$7,343	$52,740	16.7%	$925
Democrats	$243,935	$8,131	$229,085	$7,636	$38,268	16.7%	$1,196
Republicans	$222,359	$7,941	$236,473	$8,758	$35,152	14.9%	$1,134
1994							
All candidates	$392,170	$5,853	$417,478	$6,844	$74,235	17.8%	$1,017
Incumbents	$173,682	$8,271	$205,058	$10,793	$30,168	14.7%	$1,257
Nonincumbents	$218,488	$4,750	$212,419	$5,058	$44,067	20.7%	$899
Democrats	$150,337	$5,184	$145,895	$5,211	$21,336	14.6%	$688
Republicans	$229,022	$8,179	$258,752	$9,952	$50,649	19.6%	$1,634

Table 7

Effect of Individual and Political Committee Contribution Limits on State House Candidates' Revenues

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	average revenue lost	Average lost per contribution
1998								
All candidates	$369,110	$1,352	$466,023	$1,707	$30,290	6.5%	$115	$57
Incumbents	$150,618	$1,177	$182,503	$1,426	$14,562	8.0%	$114	$48
Nonincumbents	$218,492	$1,507	$283,520	$1,955	$15,728	5.5%	$117	$71
Democrats	$143,897	$1,151	$168,681	$1,349	$14,068	8.3%	$113	$58
Republicans	$203,960	$1,619	$272,336	$2,161	$14,927	5.5%	$118	$57
Progressives	$7,960	$1,592	$11,478	$2,296	$1,200	10.5%	$240	$150
Independents	$3,664	$733	$3,773	$755	$0	0	$0	$0
1996								
All candidates	$236,855	$1,528	$245,825	$1,596	$12,792	5.2%	$42	$24
Incumbents	$85,591	$1,451	$88,851	$1,506	$5,581	6.3%	$49	$39
Nonincumbents	$239,141	$1,533	$248,620	$1,604	$7,211	2.9%	$38	$19
Democrats	$126,731	$1,584	$125,557	$1,610	$6,446	5.1%	$45	$26
Republicans	$103,156	$1,453	$112,618	$1,564	$5,371	4.8%	$38	$22
Progressives	$6,903	$2,301	$8,245	$2,748	$350	4.2%	$88	$39
Independents	$2,351	$1,176	$2,200	$1,100	-$625	28.4%	$48	$39
1994								
All candidates	$322,812	$1,448	$287,183	$1,282	$9,249	3.2%	$32	$20
Incumbents	$67,423	$887	$140,023	$1,842	$2,143	1.5%	$19	$13
Nonincumbents	$255,389	$1,737	$147,161	$994	$7,106	4.8%	$40	$24
Democrats	$95,080	$980	$103,279	$1,054	$3,718	3.6%	$27	$23
Republicans	$210,677	$2,150	$100,233	$1,023	$5,281	5.3%	$44	$20
Progressives	$6,858	$2,286	$7,413	$2,471	$150	2.0%	$50	$15
Independents	$6,832	$569	$7,667	$639	$0	0.0%	$0	$0

Table 7A

Effect of Contribution Limits on All Contributions to State House Candidates

	Total spent on campaigns	Average spent	Total raised	Average raised	Total over limit	% lost to limits	Average revenue lost
1998							
All candidates	$369,110	$1,352	$466,023	$1,707	$105,730	22.7%	$402
Incumbents	$150,618	$1,177	$182,503	$1,426	$36,026	19.7%	$281
Nonincumbents	$218,492	$1,507	$283,520	$1,955	$69,704	24.6%	$516
Democrats	$143,897	$1,151	$168,681	$1,349	$28,659	17.0%	$245
Republicans	$203,960	$1,619	$272,336	$2,161	$72,638	26.7%	$576
Progressives	$7,960	$1,592	$11,478	$2,296	$1,200	10.5%	$150
Independents	$3,664	$733	$3,773	$755	$0	0	$0
1996							
All candidates	$236,855	$1,528	$245,825	$1,596	$30,337	12.3%	$100
Incumbents	$85,591	$1,451	$88,851	$1,506	$9,752	11.0%	$86
Nonincumbents	$239,141	$1,533	$248,620	$1,604	$20,585	8.3%	$108
Democrats	$126,731	$1,584	$125,557	$1,610	$17,010	13.5%	$122
Republicans	$103,156	$1,453	$112,618	$1,564	$12,352	11.0%	$87
Progressives	$6,903	$2,301	$8,245	$2,748	$350	4.2%	$39
Independents	$2,351	$1,176	$2,200	$1,100	$625	28.4%	$39
1994							
All candidates	$322,812	$1,448	$287,183	$1,282	$32,276	11.2%	$112
Incumbents	$67,423	$887	$140,023	$1,842	$7,021	5.0%	$64
Nonincumbents	$255,389	$1,737	$147,161	$994	$25,255	17.2%	$143
Democrats	$95,080	$980	$103,279	$1,054	$19,535	18.9%	$144
Republicans	$210,677	$2,150	$100,233	$1,023	$12,592	12.6%	$104
Progressives	$6,858	$2,286	$7,413	$2,471	$150	2.0%	$15
Independents	$6,832	$569	$7,667	$639	$0	0.0%	$0

Table 8

Effect of Limits on the Number of Individual and Committee Contributions for Senate Candidates

Number of contributions over the limit	1994		1996		1998	
	# of candidates	Cumulative %	# of candidates	Cumulative %	# of candidates	Cumulative %
0	35	47.3%	37	46.3%	30	39.5%
1	11	62.2%	11	60.0%	7	48.7%
2	7	71.6%	11	73.8%	3	52.6%
3	8	82.4%	3	77.5%	4	57.9%
4-10	12	100.0%	18	100.0%	27	93.4%
11-16					5	100.0%

Table 9

Effect of Limits on the Number of Individual and Committee Contributions for House Candidates

Number of contributions over the limit	1994		1996		1998	
	# of candidates	Cumulative %	# of candidates	Cumulative %	# of candidates	Cumulative %
0	259	89.6%	252	82.6%	203	73.6%
1	19	96.2%	36	94.4%	34	85.9%
2	6	98.3%	10	97.7%	23	94.2%
3	3	99.3%	6	99.7%	9	97.5%
4-12	2	100.0%	1	100.0%	7	100.0%

Note: Tables 8 and 9 includes all nonparty contributions other than contribution a candidate makes to their own campaigns.

Table 10

Contributions by Contributor Type for Statewide Candidates: Itemized Contributions Only

	# over limit	% over limit	Total contributed	amount over limit	% of total over limit	average amt. over limit
1998						
Individuals	370	7.9%	$646,202	$201,373	31.2%	$43
businesses	74	38.9%	$94,786	$50,823	53.6%	$267
political committees	28	70.0%	$49,494	$35,644	72.0%	$891
party organizations	14	63.6%	$150,462	$143,271	95.2%	$6,512
1996						
individuals	275	14.8%	$415,005	$161,557	38.9%	$87
businesses	85	50.0%	$99,130	$52,667	53.1%	$312
political committees	49	80.3%	$106,314	$84,714	79.7%	$1,389
party organizations	7	46.7%	$47,825	$43,025	90.0%	$2,868
1994						
individuals	248	12.5%	$361,917	$122,992	34.0%	$62
businesses	95	55.2%	$119,703	$73,000	61.0%	$424
political committees	24	72.7%	$50,150	$39,300	78.4%	$1,191
party organizations	7	70.0%	$17,582	$13,950	79.3%	$1,395

Table 11

Contributions by Contributor Type for State House and Senate Candidates: Itemized Contributions Only

	# over limit	% over limit	total contributed	amount over limit	% of total over limit	average amt. over limit
1998						
Individuals	223	18.9%	$243,195	$74,770	30.7%	$63
Businesses	90	31.7%	$86,440	$25,500	29.5%	$90
political committees	55	34.6%	$65,698	$33,045	50.3%	$208
party organizations	202	74.3%	$174,922	$114,512	65.5%	$421
1996						
Individuals	135	23.8%	$135,439	$42,928	31.7%	$76
Businesses	21	22.3%	$25,017	$4,950	19.8%	$53
political committees	52	38.8%	$43,469	$14,998	34.5%	$112
party organizations	63	47.4%	$53,962	$26,896	49.8%	$202
1994						
individuals	125	18.3%	$132,813	$33,583	25.3%	$49
businesses	32	23.0%	$33,067	$7,996	24.2%	$58
political committees	22	29.7%	$25,425	$9,200	36.2%	$124
party organizations	71	59.7%	$66,235	$40,771	61.6%	$343

Table 12

Comparison of Missouri's Contribution Limits with Vermont's

	Contribution limit	Size of constituency	Ratio constituency to limit
Missouri statewide	$2,150	5,359,000	0.00040
Vermont statewide	$400	589,000	0.00068
Missouri senate	$1,050	157,600	0.00666
Vermont senate 1 seat	$300	19,600	0.01531
Vermont senate 3 seats	$300	58,800	0.00510
Vermont senate 6 seats	$300	117,800	0.00255
Missouri house	$550	32,877	0.01673
Vermont house 2 seats	$200	7,800	0.02564

Table 13

Effect of Out of State Limits on Statewide Candidates' Revenues, 1998

	Vote %	Total revenue	Out of state contributions	% of total Revenue
Governor				
Dean	55.7%	$342,403	$144,706	42.3%
Dwyer	41.1%	$252,511	$49,150	19.5%
Lt. Governor				
Racine	48.6%	$115,838	$9,341	8.1%
Snelling	48.1%	$116,879	$14,555	12.5%
Secretary of State				
Markowitz	47.8%	$52,300	$14,614	27.9%
Milne	45.2%	$17,623	$5,994	34.0%
Treasurer				
Douglas	85.4%	$9,948	$0	0.0%
Auditor of Accounts				
Flanagan	52.2%	$58,831	$39,006	66.3%
Dwinnell	38.9%	$37,505	$6,300	16.8%
Attorney General				
Sorrell	83.8%	$21,484	$383	1.8%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1998.

Table 14

Effect of Out of State Limits on Statewide Candidates' Revenues, 1996

	Vote %	Total revenue	Out of state contributions	% of total revenue
Governor				
Dean	70.5%	$395,424	$205,659	52.0%
Gropper	22.4%	$45,698	$4,350	9.5%
Lt. Governor				
Racine	54.0%	$108,274	$2,500	2.3%
Carroll	41.0%	$176,052	$32,275	18.3%
Secretary of State				
Milne	81.4%	$3,035	$0	0.0%
Treasurer				
Douglas	85.8%	$8,583	$0	0.0%
Auditor of Accounts				
Flanagan	49.6%	$79,352	$35,485	44.7%
Morrissey	39.1%	$30,025	$1,900	6.3%
Attorney General				
Amestoy	87.2%	$9,110	$5,100	56.0%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1996.

Table 15

Effect of Out of State Limits on Statewide Candidates' Revenues, 1994

	Vote %	Total revenue	Out of state contributions	% of total revenue
Governor				
Dean	68.6%	$368,117	$223,739	60.8%
Kelly	19.0%	$38,426	$750	2.0%
Lt. Governor				
Snelling	50.2%	$149,813	$15,650	10.4%
Racine	46.8%	$88,185	$2,400	2.7%
Secretary of State				
Milne	50.0%	$18,946	$800	4.2%
Hooper	42.1%	$29,875	$13,900	46.5%
Treasurer				
Douglas	91.4%	$8,436	$0	0.0%
Auditor of Accounts				
Flanagan	52.0%	$14,770	$10,125	68.6%
Thorn	38.5%	$11,968	$450	3.8%
Attorney General				
Amestoy	87.1%	$4,550	$1,750	38.5%

Note: None of the third party or independent candidates received any contributions from outside of Vermont in 1994 except for Thomas Morse (I) who received $28 (or 2% of his revenues) from out of state.

Table 16

Effect of Out of State Limits on State Senate and House Candidates' Revenues

		average revenues from out of state	average % out of state
Senate			
	1994	$552	7.5%
	1996	$514	9.0%
	1998	$114	0.9%
House			
	1994	$27	1.7%
	1996	$48	2.6%
	1998	$69	2.2%

Note: the 1998 "average % out of state" cells were calculated differently from the 1994 and 1996 due to data limitations. The 1998 average % is actually the % of total revenue raised from out of state sources. Both methods result in similar numbers for 1994 and 1996. The 0.9% for 1998 does represent a significant drop in identifiable out of state contributions.

Table 17

Campaign Expenditures, Statewide Candidates, 1998

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	55.7%	$435,273	$255,000	$180,273
Dwyer (R)	41.1%	$252,512	$300,000	-$47,488
Rome (R)		$216,413	$300,000	-$83,587
Berkey (Lib)	0.9%	$120	$300,000	-$299,880
Gottlieb (Lib Union)	0.5%	$0	$300,000	-$300,000
Williams (VG)	1.5%	$0	$300,000	-$300,000
Lt. Governor				
Racine (D)	48.6%	$114,538	$85,000	$29,538
Snelling (R)	48.1%	$117,611	$100,000	$17,611
Faeterri (Lib)	0.6%	$0	$100,000	-$100,000
Newton (Lib Union)	0.7%	$0	$100,000	-$100,000
Coleman (VG)	1.8%	$0	$100,000	-$100,000
Secretary of State				
Markowitz (D)	47.8%	$58,282	$45,000	$13,282
Milne (R)	45.2%	$15,240	$38,250	-$23,010
Richmond (Lib)	2.9%	$100	$45,000	-$44,900
Lane (VG)	3.9%	$153	$45,000	-$44,847
Treasurer				
Douglas (R/D)	85.4%	$2,521	$38,250	-$35,729
Baker (Lib)	3.6%	$0	$45,000	-$45,000
Linskey (Lib Union)	4.7%	$0	$45,000	-$45,000
Bushey (VG)	6.0%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	52.2%	$58,239	$38,250	$19,989
Dwinnell (R)	38.9%	$63,309	$45,000	$18,309
Baker (Lib)	2.8%	$142	$45,000	-$44,858
Jackowski (Lib Union)	2.9%	$0	$45,000	-$45,000
Saetta (VG)	3.0%	$0	$45,000	-$45,000
Attorney General				
Sorrell (D)	83.8%	$11,431	$38,250	-$26,819
Costanzo (Lib)	4.5%	$1,231	$45,000	-$43,769
Fisher (Lib Union)	2.5%	$0	$45,000	-$45,000
Ward (VG)	8.8%	$0	$45,000	-$45,000

Table 18

Campaign Expenditures, Statewide Candidates, 1996

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	70.5%	$191,203	$255,000	-$63,797
Gropper (R)	22.4%	$46,244	$300,000	-$253,756
Randall (Lib)	1.1%	$10,284	$300,000	-$289,716
Herbert (Lib Union)	1.6%	$454	$300,000	-$299,546
Lane (VG)	1.4%	$556	$300,000	-$299,444
St. John (I)	1.2%	$6,472	$300,000	-$293,528
Brunelle (Nat Law)	1.3%	$0	$300,000	-$300,000
Lt. Governor				
Racine (D)	54.0%	$138,418	$100,000	$38,418
Carroll (R)	41.0%	$171,690	$100,000	$71,690
Ngoima (Lib Union)	1.0%	$0	$100,000	-$100,000
Coleman (VG)	2.1%	$206	$100,000	-$99,794
Bate (Nat Law)	1.6%	$0	$100,000	-$100,000
Secretary of State				
Milne (R/D)	81.4%	$1,878	$38,250	-$36,372
Costanzo (L)	3.1%	$311	$45,000	-$44,689
Levy (Lib Union)	3.3%	$0	$45,000	-$45,000
De Pierro (VG)	7.4%	$13	$45,000	-$44,987
Wilder (Nat Law)	4.5%	$0	$45,000	-$45,000
Treasurer				
Douglas (R/D)	85.8%	$4,826	$38,250	-$33,424
Gottlieb (Lib Union)	3.5%	$0	$45,000	-$45,000
Bushey (VG)	7.0%	$0	$45,000	-$45,000
Bate (Nat Law)	3.4%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	49.6%	$57,248	$38,250	$18,998
Morrissey (R)	39.1%	$26,928	$45,000	-$18,072
Baker (L)	2.3%	$513	$45,000	-$44,487
Davenport (Lib Union)	2.5%	$0	$45,000	-$45,000
Sweet (VG)	4.6%	$0	$45,000	-$45,000
McLaud (Nat Law)	1.5%	$0	$45,000	-$45,000
Attorney General				
Amestoy	87.2%	$3,987	$38,250	-$34,263
Diamondstone (Lib U)	3.5%	$0	$45,000	-$45,000
Kingston (VG)	6.0%	$0	$45,000	-$45,000
Huston (Nat Law)	3.0%	$0	$45,000	-$45,000

Table 19

Campaign Expenditures, Statewide Candidates, 1994

	vote %	total campaign expenditures	expenditure limit	difference with expenditure limit
Governor				
Dean (D)	68.6%	$183,300	$255,000	-$71,700
Kelly (R)	19.0%	$36,268	$300,000	-$263,732
Gottlieb (Lib Union)	0.8%	$0	$300,000	-$300,000
Lane (VG)	1.0%	$714	$300,000	-$299,286
Brunelle (Nat Law)	0.7%	$0	$300,000	-$300,000
Jaccaci (People VT)	0.9%	$720	$300,000	-$299,280
Brueckner (I)	0.9%	$0	$300,000	-$300,000
Morse (I)	7.0%	$113,427	$300,000	-$186,573
Lt. Governor				
Snelling (R)	50.2%	$115,719	$100,000	$15,719
Racine (D)	46.8%	$106,735	$100,000	$6,735
Haas (Lib Union)	1.3%	$0	$100,000	-$100,000
Bate (Nat Law)	1.4%	$0	$100,000	-$100,000
Secretary of State				
Milne (R)	50.0%	$26,733	$45,000	-$18,267
Hooper (D)	42.1%	$39,743	$38,250	$1,493
Herbert (Lib Union)	4.6%	$0	$45,000	-$45,000
Padilla (Nat Law)	3.0%	$0	$45,000	-$45,000
Treasurer				
Douglas (D)	91.4%	$4,485	$38,250	-$33,765
Ngoima (Lib Union)	3.6%	$0	$45,000	-$45,000
Schumacher (Nat Law)	4.8%	$0	$45,000	-$45,000
Auditor of Accounts				
Flanagan (D)	52.0%	$32,383	$45,000	-$12,617
Thorn (R)	38.5%	$11,698	$45,000	-$33,302
Davenport (Lib Union)	3.9%	$0	$45,000	-$45,000
McLaud (Nat Law)	1.7%	$0	$45,000	-$45,000
Redden (VG)	3.6%	$0	$45,000	-$45,000
Attorney General				
Amestoy (R/D)	87.1%	$3,373	$38,250	-$34,877
Diamondstone (Lib U)	5.5%	$0	$45,000	-$45,000
Mulchay (Nat Law)	3.7%	$0	$45,000	-$45,000
Talcott (VG)	3.4%	$0	$45,000	-$45,000

Table 20

Campaign Expenditures State Senate Candidates

	Total spent on campaigns	Average spent	Spending Limit	Ave. spent minus limit
1998				
All candidates	$551,328	$7,450		
Incumbents	$249,740	$8,919		
Nonincumbents	$302,711	$6,441		
Democrats	$229,523	$8,828		
Republicans	$310,575	$9,705		
1 seat	$40,365	$5,766	$4,000	$1,766
2 seats	$163,143	$5,827	$6,500	-$673
3 seats	$194,937	$8,122	$9,000	-$878
6 seats	$152,883	$10,192	$16,500	-$6,308
1996				
All candidates	$492,064	$7,689		
Incumbents	$144,802	$7,621		
Nonincumbents	$324,600	$7,549		
Democrats	$243,935	$8,131		
Republicans	$222,359	$7,941		
1 seat	$23,347	$5,837	$4,000	$1,837
2 seats	$130,024	$5,910	$6,500	-$590
3 seats	$144,475	$6,880	$9,000	-$2,120
6 seats	$171,556	$11,437	$16,500	-$5063
1994				
All candidates	$392,170	$5,853		
Incumbents	$173,682	$8,271		
Nonincumbents	$218,488	$4,750		
Democrats	$150,337	$5,184		
Republicans	$229,022	$8,179		
1 seat	$21,147	$4,229	$4,000	$229
2 seats	$101,427	$4,057	$6,500	-$2,443
3 seats	$147,660	$6,152	$9,000	-$2,848
6 seats	$121,937	$9,380	$16,500	-$7,120

Table 21

Campaign Expenditures House Candidates

	Total spent on campaigns	Average spent	Expenditure limits	Ave. Spent minus limit
1998				
All candidates	$369,110	$1,352	$2,000	-$648
Incumbents	$150,618	$1,177	$1,800	-$623
Nonincumbents	$218,492	$1,507	$2,000	-$493
Democrats	$143,897	$1,151	$2,000	-$849
Republicans	$203,960	$1,619	$2,000	-$381
Progressives	$7,960	$1,592	$2,000	-$408
Independents	$3,664	$733	$2,000	-$1,267
1 seat	$193,811	$1,526	$2,000	-$474
2 seats	$175,299	$1,201	$3,000	-$1,799
1996				
All candidates	$236,855	$1,528	$2,000	-$472
Incumbents	$85,591	$1,451	$1,800	-$349
Nonincumbents	$239,141	$1,533	$2,000	-$467
Democrats	$126,731	$1,584	$2,000	-$416
Republicans	$103,156	$1,453	$2,000	-$547
Progressives	$6,903	$2,301	$2,000	$301
Independents	$2,351	$1,176	$2,000	-$824
1 seat	$125,703	$1,676	$2,000	-$324
2 seats	$111,152	$1,389	$3,000	-$1,611
1994				
All candidates	$322,812	$1,448	$2,000	-$552
Incumbents	$67,423	$887	$1,800	-$913
Nonincumbents	$255,389	$1,737	$2,000	-$263
Democrats	$95,080	$980	$2,000	-$1,020
Republicans	$210,677	$2,150	$2,000	$150
Progressives	$6,858	$2,286	$2,000	$286
Independents	$6,832	$569	$2,000	-$1,431
1 seat	$192,936	$2,010	$2,000	$10
2 seats	$129,876	$1,023	$3,000	-$1,977

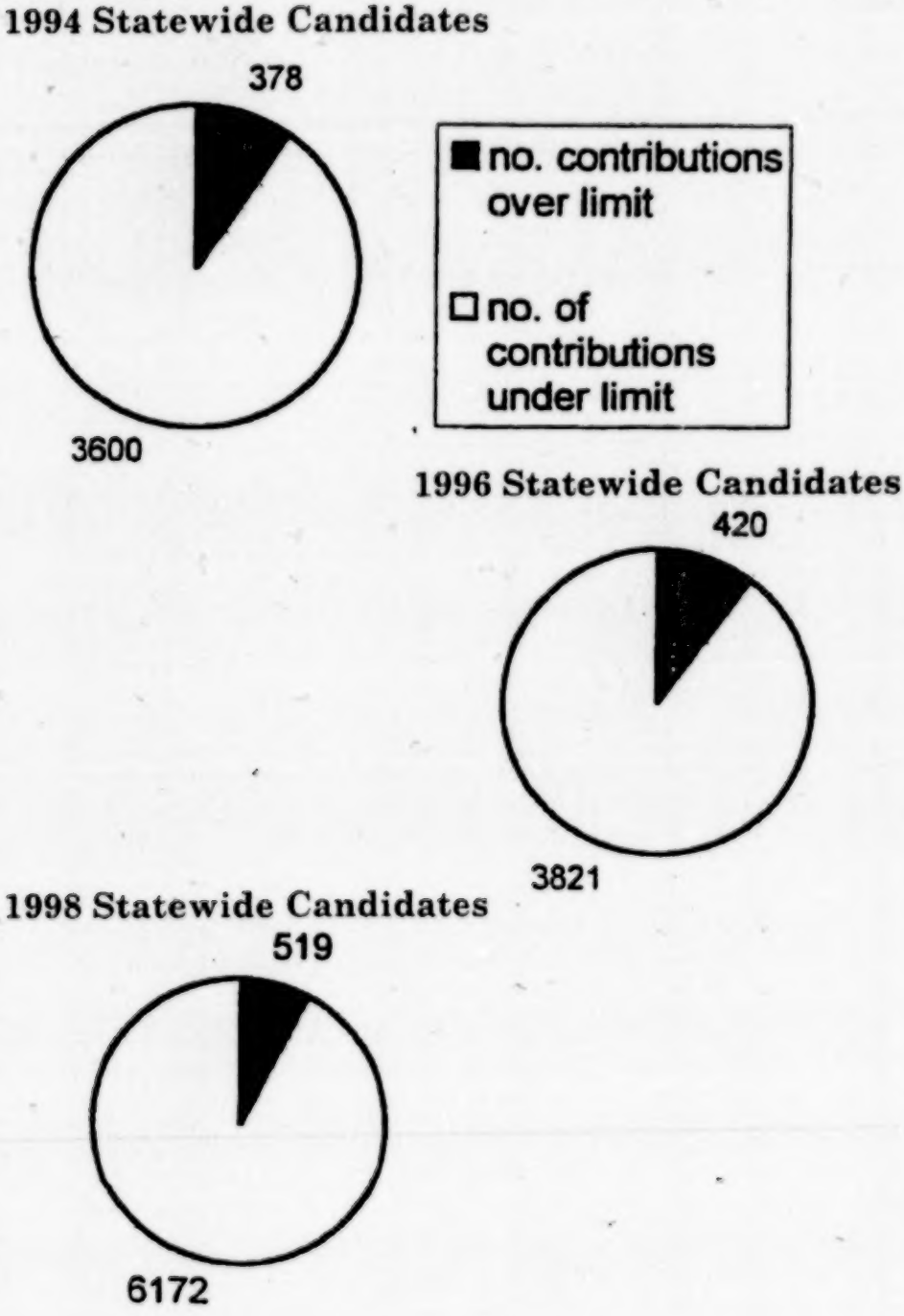

Figure 1s: Contributions to statewide candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

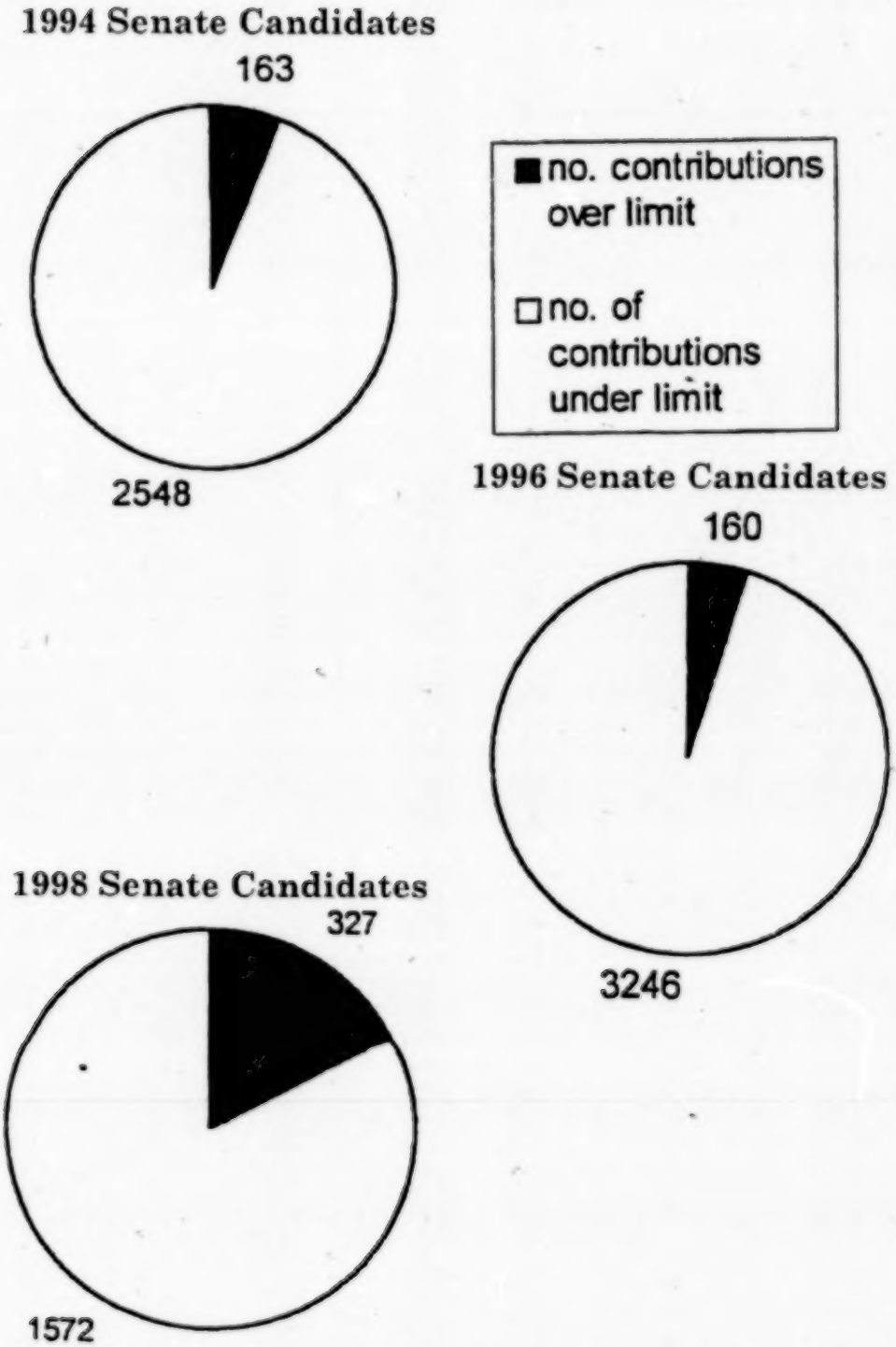

Figure 2s: Contributions to senate candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

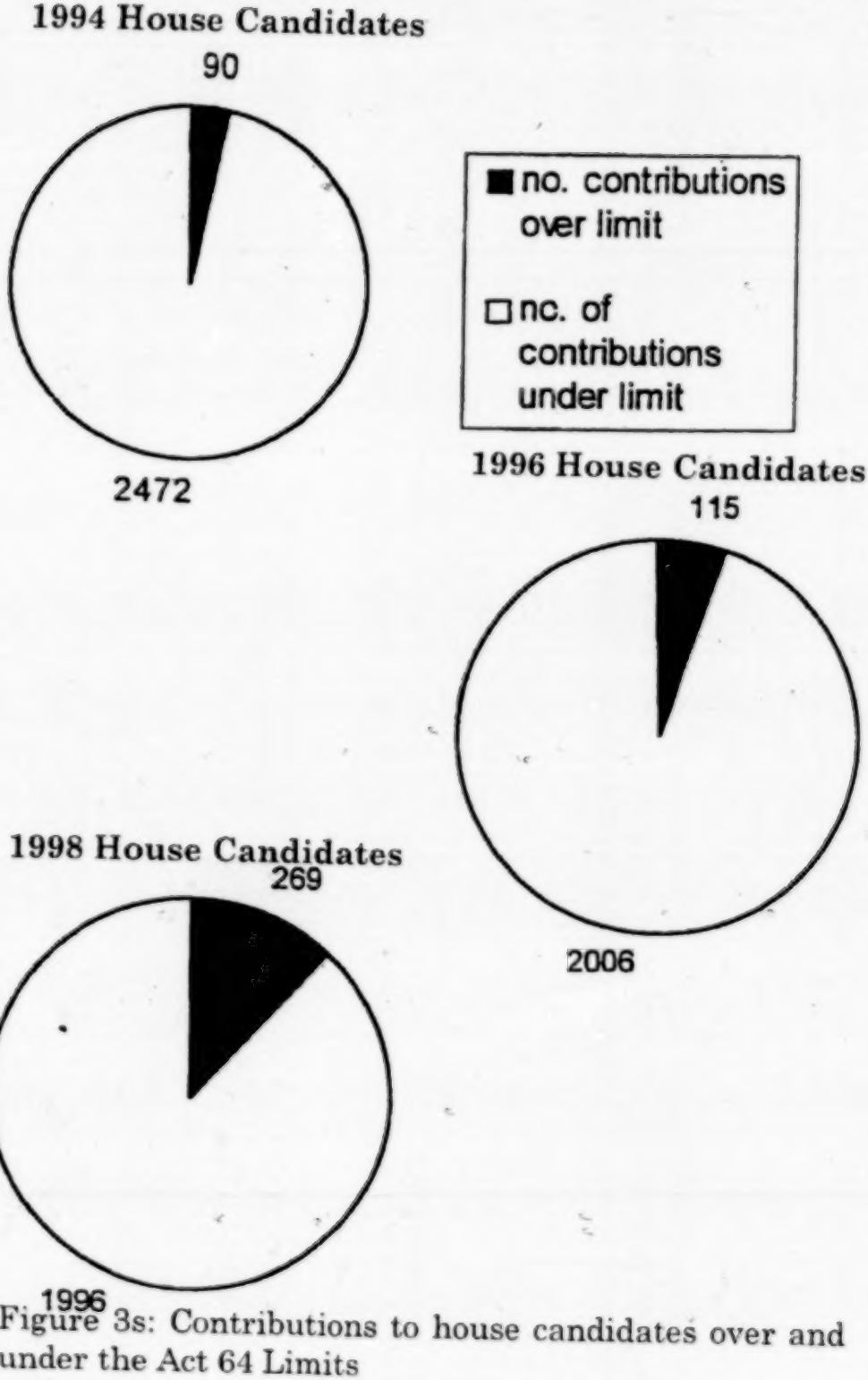

Figure 3s: Contributions to house candidates over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

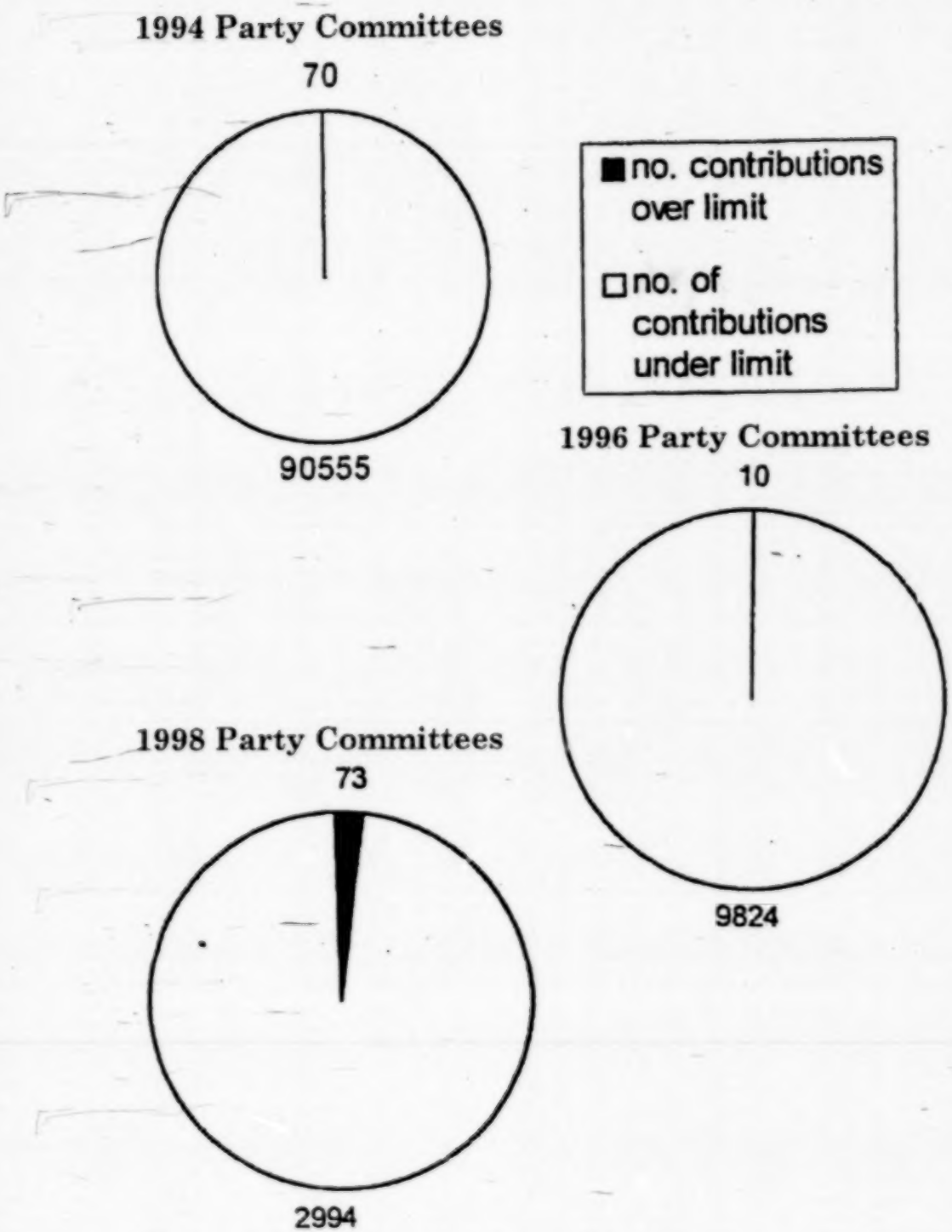

Figure 4s: Contributions to political party committees over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

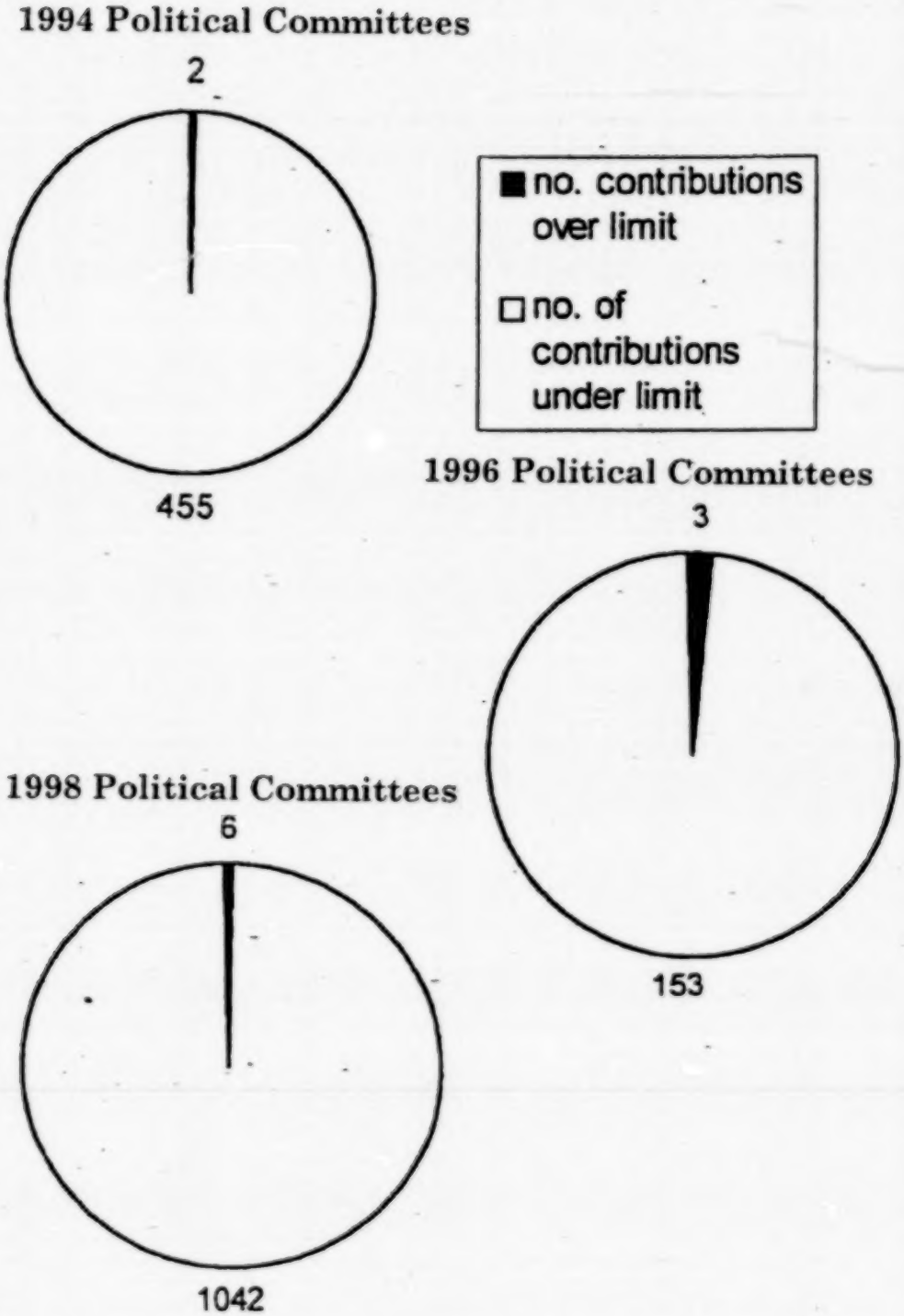

Figure 5s: Contributions to political committees over and under the Act 64 Limits

Source: Table 2 in Gierzynski Report

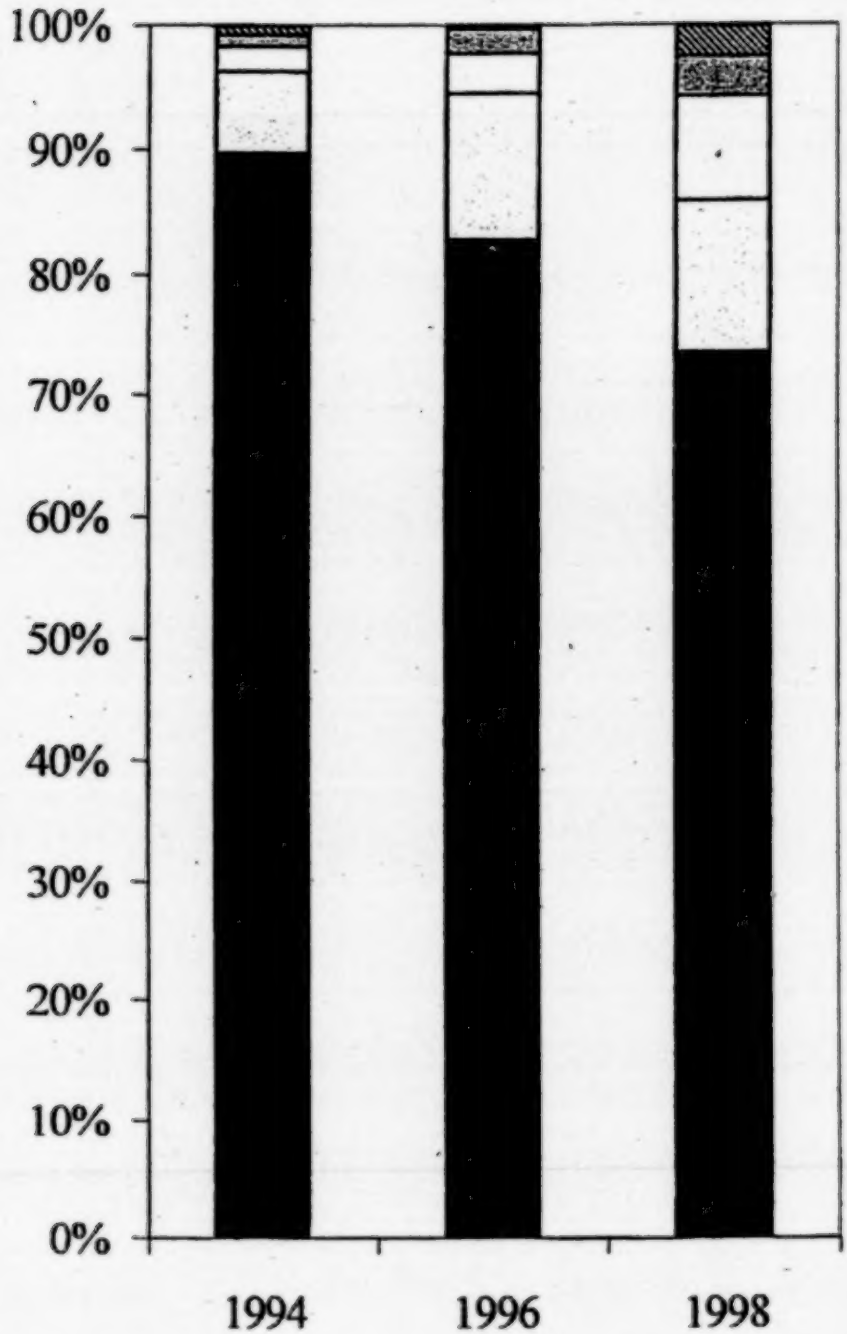

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Figure: House Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

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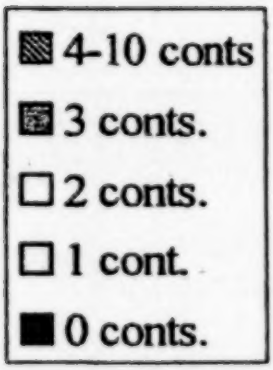

Figure: House Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

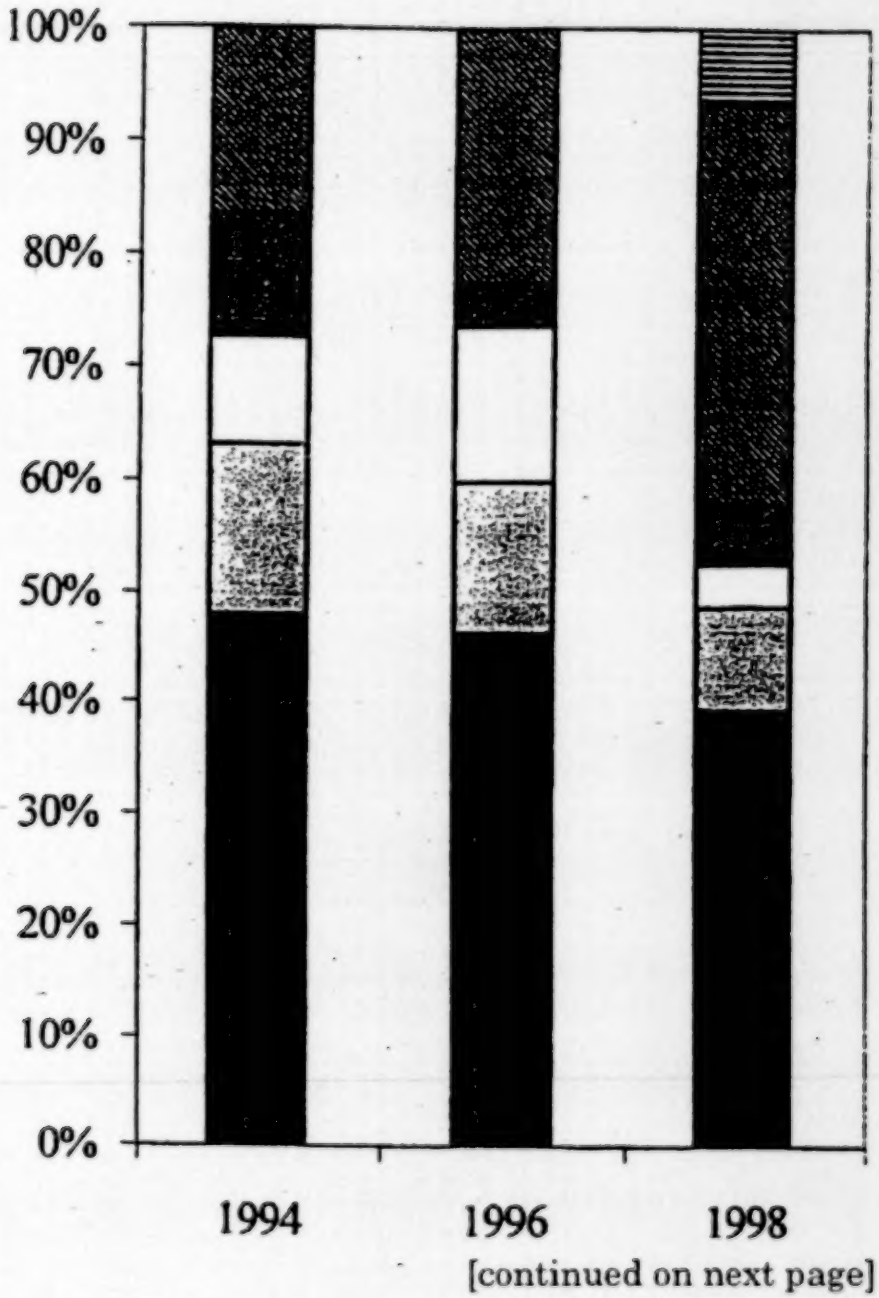

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Figure: Senate Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998

Source: Tables 8-9 in Gierzynski Report

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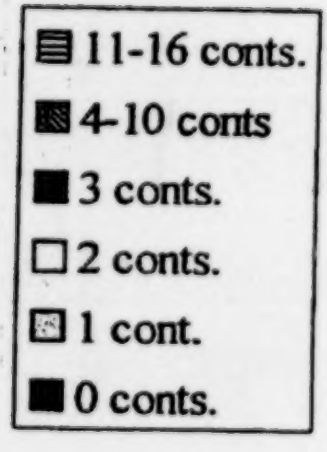

Figure: Senate Candidates and the Number of Contributions Affected by Contribution Limits, 1994-1998
Source: Tables 8-9 in Gierzynski Report

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of May, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

- - v. - -

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO,

DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

ORDER

Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing en banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case en banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing en banc, rehearing en banc was **DENIED** by order of the court filed on February 11, 2005, and amended on April 11, 2005, and April 20, 2005.

The court hereby **AMENDS** that order to reflect that, upon, consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was **DENIED.** Judge Winter dissents from the denial of rehearing.

The court also **AMENDS** the February 11, 2005, order to reflect (1) the opinions concurring in the court's denial of rehearing en banc filed by Judge Calabresi, Judges Straub and Pooler, and Judges Sack and Katzmann, and (2) the opinions dissenting from the court's denial of rehearing en banc filed by Chief Judge Walker, Judge Jacobs, Judge Cabranes, and Judge Raggi.

Judges Calabresi, Straub, Pooler, Sack, Sotomayor, Katzmann, and B.D. Parker concur in the denial of rehearing en banc. Chief Judge Walker and Judges Jacobs, Cabranes, Raggi, and Wesley dissent from the denial of rehearing en banc. With this order, Judge Calabresi is filing a concurring opinion; Judges Straub and Pooler are filing a concurring opinion; Judges Sack and Katzmann are filing a concurring opinion, in which Judges Sotomayor and B.D. Parker join; Chief Judge Walker is filing a dissenting opinion, in which Judge Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join; and Judge Raggi is filing a dissenting opinion.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

CALABRESI, *Circuit Judge*, concurring in the denial of rehearing en banc.

I.

The prudential reasons given in the thoughtful opinion of Judge Sack and Judge Katzmann, *infra* at 14, would, in themselves, justify concurring in a denial of a rehearing en banc. I write separately, though, because I have an additional and rather different reason for voting against such a rehearing.

It seems to me that there are two principal values at play in the campaign finance debate. One is the desire to let individuals express the intensity of their political feelings, and to do so in a very particular way — that is, through money in the form of either campaign expenditures or contributions. This value has been consistently treated as deserving of First Amendment protection. *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. 93, 134-38 (2003); *Buckley v. Valeo*, 424 U.S. 1, 19-22 (1976). Nonetheless, it is not absolute. For example, no one argues that a state is precluded from prohibiting the purchase of votes, even though buying votes amounts to the most direct way in which intensity of feeling can be expressed through the use of money. *See* 42 U.S.C. § 1973i(c). *Cf. Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982).[1]

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[1]One could argue that *Buckley* expressed skepticism toward characterizing "intensity" of political feeling, as manifested by the amount of money spent, as an *independent* First Amendment value. Thus, with respect to political contributions, *Buckley* stated that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Moreover, even with respect to campaign *expenditures*, much of *Buckley's* focus was on the impact that restricting the purchase of speech, by a candidate or other advocate, would have on the "marketplace of ideas," rather than on

The other value is the deeply felt desire not to have the wealthy be able to influence elections more than the poor.[2] This value, however, has two distinct aspects. The first is the generalized egalitarian desire not to advantage one group in society over another. The second — which is inextricably linked to the "intensity of expression" value and hence partakes of its First Amendment attributes — is that, given the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially,

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the diminishment of the speaker's unilateral right to communicate his or her belief, and the intensity thereof. *See, e.g., id.* at 19-20, 47-48, 52-53.

Nevertheless, and at times in tension with its statements concerning "undifferentiated, symbolic" acts of contribution, the *Buckley* Court clearly stated that the *quantity* and *volume* of individual political expression through contributions *and* expenditures was a protected First Amendment interest. Thus, in invalidating limitations on independent expenditures (often made by PACs), *Buckley* noted that the restrictions "preclude[d] most associations from *effectively amplifying the voice of their adherents*," and therefore were not only an interference with the groups' speech rights, but were "simultaneously an interference with the freedom of (their) adherents." *Id.* at 22 (internal quotations and citation omitted) (emphasis added). *Buckley* also said that spending caps directly interfere with the spender's "right to speak" his or her mind and "to engage in vigorous advocacy" in the course of an election, and it described these as rights that are "no less entitled to protection under the First Amendment than the discussion of political policy generally." *Buckley*, 424 U.S. at 48 (internal quotations and citations omitted); *see also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more that $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.").

[2]My "wealthy" and "poor" nomenclature is, of course, shorthand. The same analysis applies with as great of force to members of the middle class.

a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person. *Cf. Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-58 (1986) (discussing the "threat" posed to the "political marketplace" by corporate spending where "[t]he resources in the treasury of a business corporation" do not directly correlate to intensity of "popular support for the corporation's political ideas"). This way of looking at things is anything but new. *See, e.g., Luke* 21:3-4 (English Standard Version) ("Truly, I tell you, this poor widow has put in more than all of them. For they all contributed out of their abundance, but she out of her poverty put in all she had to live on.").[3] Significantly, though, this second aspect is reflective not only of egalitarian concerns, but as much of First Amendment libertarian ones.

The notion that intensity of desire is not well-measured by money in a society where money is not equally distributed has been, since *Buckley*, the huge elephant — and donkey — in the living room in all discussions of campaign finance reform. *Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. *Buckley*, 424 U.S. at 17, 48-49. And yet, I submit, it remains at least implicitly behind

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[3] *See also Buckley*, 424 U.S. at 21-22 & n.22 (noting that "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate," and that "[o]ther factors relevant to an assessment of the 'intensity' of the support indicated by a contribution include the contributor's financial ability and his past contribution history."). *But see id.* at 56 (observing that unlimited campaign expenditures are appropriate in part because, given contribution limitations, "the financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support").

much campaign finance reform legislation.

The odd thing about *Buckley's* exclusion of this interest from the field of discussion is that, as mentioned above, this concern is in part directly linked to the Supreme Court's asserted First Amendment concern — the desire to protect the right for people to express, in money terms, the intensity of their political ideas and affiliations. It may be that the High Court's failure to recognize this fact occurred because the Court in *Buckley* focused its attention on the desire not to favor one group, the rich, over another, the poor — or vice versa, *see id.* at 48-49. And, in deciding not to give weight to that value, the Court failed to realize that it was also excluding — as a potentially compelling state interest — the First Amendment right to have one's intensity of desire, as expressed in monetary terms, be measured equally.

Be that as it may, the *Buckley* framework, which establishes that the desire to express intensity of political position through money is fundamental, at the same time prohibits the states from seeking to find a way of gauging and treating intensity of desire equally among its citizens, rich and poor.[4] As a result of this odd decision, the

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[4]Of course, it remains true that money is not the only means by which intensity of political belief may be expressed. In light of this obvious fact, it may perhaps be asserted that there is no compelling interest in giving individuals who lack financial resources an ability equal to that afforded to wealthier individuals to express intensity of feeling in the monetary marketplace of political discourse. But then the converse must also be true. That is, people or entities of means, whose contributions and expenditures campaign finance legislation might seek to limit, also enjoy alternate mechanisms for expressing the intensity of their political beliefs. And, if there is nothing uniquely important, in a First Amendment context, about expressing intensity of belief in monetary terms for those who do not have money, the same must presumably be true for those who do. In either case, though, the centrality of money in political campaigns makes it a uniquely important mechanism by which intensity of political belief is expressed. *Cf. Buckley*, 424 U.S. at 18 n.17 (observing that the

judicial discussion since *Buckley* has centered on other values, which, though by no means unimportant, are, I believe, not really at the core of the debate. There is much talk of "corruption" and what controls are necessary to avoid it, and of the danger that what is done under the guise of controlling corruption may be used to protect incumbents. There is, likewise, concern about the cost of fundraising and similar factors. I do not mean to suggest that these are not serious questions. But a treatment of campaign financing that focuses primarily on those issues is surely impoverished, for it does not deal with what is at least as important, and, perhaps, at the very heart of the problem.

Indeed, because of *Buckley*, even academicians have focused on campaign finance reform primarily in the light of these subsidiary goals. Thus, some have tried to "solve" the campaign finance problem by providing for anonymous contributions. *See, e.g.*, Ian Ayres & Jeremy Bulow, The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence, 50 Stan. L. Rev. 837 (1988). But that does nothing to ameliorate the fact that "intensity of desire" under *Buckley* depends on the underlying wealth of the donor, and hence is measured by a rubber yard stick. And this is so regardless of whether the donation is made openly or secretly. Others, trying to avoid corruption and protection of incumbents, and also to counter the advantage *Buckley* gave to the rich, seek to overwhelm individual contributions with

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argument that "just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment," so too may the "volume of dollars in political campaigns" be constitutionally restricted "underscores a fundamental misconception. The decibel restriction . . . limit[s] the manner of operating a soundtruck but not the extent of its proper use. By contrast, the [Federal Election Campaign] Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information.").

massive funds made available to everyone for campaign spending. *See, e.g.*, Bruce Ackerman, Crediting the Voters: A New Beginning for Campaign Finance Reform, Am. Prospect, Spring 1993, at 71; Edward B. Foley, Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance Reform, 94 Colum. L. Rev. 1204 (1994). But they do so in a way that undercuts the capacity of people, *both* poor and rich, to give financial expression to the relative intensity of their desire. Moreover, even the most sophisticated "hybrid" campaign finance proposals, in advocating complex combinations of donor anonymity, public funding, and controlled private giving, do not directly address this difficulty. *See, e.g.*, Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance 25-44 (2002).

Solutions that take into account both (a) the perceived need to protect the right to express one's intensity of desire in political matters through (among other mechanisms) money, and, at the same time, (b) the wish to measure and give effect to that intensity of desire in a way that is fair to the rich and the poor alike, are not obvious. Some potentially fruitful, if logistically challenging, suggestions have been made in other contexts. *See, e.g.*, Philip Bobbit & Guido Calabresi, Tragic Choices 98-117 (1978) (discussing possibilities and limitations of wealth-distribution-neutral markets). But it remains the case that the finding of such solutions in the world of campaign financing has been, and will continue to be, severely hampered if the discussion taking place in legislatures and courthouses is centered — as it now is — not on the problem, but on collateral issues.

This is so, moreover, even if one considers those issues that I described as "collateral" — corruption, incumbent protection, fundraising, time, etc. — to be, themselves, of primary importance. Efforts to tailor all campaign finance reform to corruption — the one state interest

heretofore recognized by the Supreme Court as sufficiently compelling to justify spending restrictions of any sort[5] — surely have constrained possibilities for creative proposals that may not fit comfortably into the proffered box.

II.

I believe that it is not out of the question that Vermont, in passing Act 64, was as likely to be concerned with the goal of enabling of all Vermonters — be they political candidates or political contributors — to have something of an "equal" opportunity to express intensity of political desire, as it was with the possibility of corruption, saving time, or on the alleged desire to protect incumbents. *Cf. Landell v. Sorrell*, 382 F.3d 91, 100-02 (2d Cir. 2004) (setting forth legislative findings in support of Act 64, including: (1) that "[a]s a result [of the rising cost of campaigns] many Vermonters are financially unable to seek election to public office"; (2) that "large contributors" gain time and access to candidates to an extent that "those who make small or no contributions" do not; and (3) that "public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates"). Indeed, I think that in Vermont, no less than in other places, interests and values such as corruption and time-saving are often defined in expansive ways so as to allow the introduction (under *Buckley*'s doctrinal radar) of values that are directly related (1) to the wish to protect the right to express through money the intensity of one's desire, and (2) to make sure that

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[5] *Cf. National Conservative Political Action Committee*, 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling interests *thus far identified* for restricting campaign finances." (emphasis added)).

that intensity is not measured differently for rich and for poor.[6]

I cannot help but suspect, however, that the sort of conversation taking place in Vermont (and elsewhere) would be a far more fruitful one — from the standpoints both of campaign finance policy and constitutional jurisprudence — were it able to be brought out from under *Buckley*'s corruption mantle and into a framework that more honestly reflects the issues at play.

III.

I do not know whether the decision of the panel in the case before us is consistent with *Buckley v. Valeo*. I do know that if I were on a panel I would have to decide that question, for I would be bound to follow *Buckley*, however much I think that that decision has diverted the campaign finance reform discussion from the fundamental First Amendment-level values at stake. If I am called upon to vote on a panel, I, of course, follow what I believe the Supreme Court to have held, and I do so whether or not I agree with that holding.

A vote on whether to grant an en banc rehearing, instead, is a "free vote." As the concurring opinion by Judge Sack and Judge Katzmann so elegantly points out, *infra* at 15-18, we may decline to vote to go en banc for any number of reasons, and we need not vote to rehear a

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[6]The Supreme Court itself has seemingly endorsed a broader understanding of the "corruption" rationale than what *Buckley* enunciated — an understanding that could perhaps be read as gesturing toward some of the "equality" considerations that *Buckley* purportedly purged from the debate. Thus, the Court in *Shrink*, rejecting the notion that "corruption" encompassed solely the notion of quid-pro-quo contribution arrangements, announced that the interest encompassed "the *broader threat from politicians too compliant with the wishes of large contributors*" — that is to say, politicians who give *unequal* weight to constituents on the basis of wealth. 528 U.S. at 389 (emphasis added); *see also McConnell*, 540 U.S. at 143, 150-52 (2004).

case en banc simply because we think that an opinion is wrong or is possibly inconsistent with a prior Supreme Court decision. There are many prudential considerations thatmay, in different circumstances, properly guide us in ourconsideration of whether an en banc is appropriate. And so, in deciding whether to vote to rehear *this* case en banc, I posed myself the following question: which vote is most likely to bring back into the discussion the issues that I believe to be fundamental with respect to campaign finance legislation?

Ultimately, only the Supreme Court can, by reconsidering *Buckley*, encourage a free and open discussion of what is moving states in this field, and of what ways there might be of best serving the apparently conflicting interests at stake. Not surprisingly, a majority of the Supreme Court itself has indicated an inclination to reopen the question. *See Federal Election Commission v. Colorado Republican Party*, 533 U.S. 431, 465 (2001) (Thomas, *J.*; dissenting) (stating, joined by Justices Kennedy and Scalia, that "*Buckley v. Valeo* . . . should be overruled"); *Shrink*, 528 U.S. at 398-99 (2000) (Stevens, *J.*, concurring) (suggesting disagreement with *Buckley*'s "[r]eliance on the First Amendment framework to justify the invalidation of campaign finance regulations"); *id.* at 405 (Breyer, *J.*, concurring) (stating, joined by Justice Ginsburg, that reconsideration of *Buckley* may be necessary); *id.*, 528 U.S. at 410 (Kennedy, *J.*, dissenting) ("[T]he existing distortion of speech caused by the halfway house we created in *Buckley* ought to be eliminated."). And some have even urged reconsideration on grounds that could potentially recognize the need for equality in gauging intensity of desire in monetary terms. *See, e.g., id.* at 401 (Breyer, *J.*, concurring) ("[B]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process." (citing *Reynolds v. Sims*,

377 U.S. 533, 565 (1964), thereby linking campaign finance jurisprudence to one-person, one-vote jurisprudence)).

I believe such a reconsideration to be essential. And, because I conclude that a reconsideration is more likely to occur if we do *not* rehear this case en banc than if we do, I concur in the denial of such a rehearing.

*****

REENA RAGGI, *Circuit Judge*, dissenting from the denial of rehearing en banc:

I dissent from the court's denial of rehearing en banc without joining in the thoughtful opinions of my dissenting colleagues. I think that this case presents serious questions that warrant further consideration by the whole court, but I am disinclined to express an opinion on the merits without the benefit of further briefing and argument.

(30)

No. 04-1528

Supreme Court, U.S.
FILED
DEC 13 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

—v.—

WILLIAM H. SORRELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on candidate spending violate the First Amendment and this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

2. Whether Vermont's treatment of independent expenditures by political parties and committees as presumptively coordinated if they benefit fewer than six candidates, and thereby subject to strict contribution and expenditure limits, is consistent with the First Amendment and this Court's decision in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

3. Whether Vermont's contribution limits, which are the lowest in the country, which allow only a single maximum contribution in an entire two-year general election cycle, and which prohibit even state political parties from contributing more than $400 to their gubernatorial candidate, fall below an acceptable constitutional threshold and should be struck down.

LIST OF PARTIES

Petitioners are Neil Randall, George Kuusela, John Patch, Steven Howard, Jeffrey Nelson, and the Libertarian Party of Vermont.

Consolidated Plaintiffs are Marcella Landell, Donald R. Brunelle, Vermont Right to Life Committee, Inc., Political Committee, Vermont Republican State Committee, and Vermont Right to Life Committee-Fund for Independent Political Expenditures.

Respondents are the Attorney General of the State of Vermont, William H. Sorrell, the Secretary of State of the State of Vermont, Deborah Markowitz, and various state and local officials charged with enforcement of the challenged statute: John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, and Robert L. Sand.

Respondent-Intervenors are Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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OPINIONS AND ORDERS BELOW

The district court's opinion is reported as *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000), and is reprinted in the Appendix to the Petition for Certiorari in No. 04-1528 ("P.A.") at 21a-89a. The Second Circuit's original decision, 300 F.3d 129 (2nd Cir. 2002), was withdrawn and is not reprinted. The Second Circuit's amended opinion, 382 F.3d 91 (2nd Cir. 2004), is reprinted at P.A. 90a-312a.

Rehearing and rehearing en banc were denied on February 11, 2005. P.A. 313a-314a. The Order denying rehearing was subsequently amended to reflect the separate concurring and dissenting opinions of the circuit judges. P.A. 315a-344a (Second Amended Order). The third and final Amended Order was issued after the Petitions for Certiorari in this matter were filed and is reprinted in the Joint Appendix (J.A.) at 98-110.

JURISDICTION

The Second Circuit's amended decision was entered on August 18, 2004. On February 11, 2005, that court entered an order denying plaintiffs' petition for rehearing *en banc*. A Petition for Certiorari was filed in No. 04-1528 on May 11, 2005 and in No. 04-1530 on May 12, 2005. Both petitions were granted and the matters consolidated by this Court on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

1997 Vt. Laws Pub. Act 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64") is set out in full at P.A. 1a-20a.

Subsequent to trial and after the petitions for certiorari were filed, the Vermont legislature passed Senate Bill 16, 2005 Vt. Laws Pub. Act 62, which contains certain amendments to 17 V.S.A. §§ 2801 et seq. The amendments have an effective date of July 1, 2005. A copy of 2005 Vt. Laws Pub. Act 62 is set out in an appendix to this brief.

STATEMENT OF THE CASE

This is a First Amendment challenge to Vermont's comprehensive campaign finance law, 1997 Vt. Laws Pub. Act 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64"). Vermont's law was adopted in 1997 with the "express intent" of challenging *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and became effective the day after the November 1998 election. The explicit goals of Act 64 were to reduce campaign spending, limit the length of campaigns, and influence the manner in which campaigns are conducted.

Act 64 directly challenged *Buckley* by imposing mandatory, unprecedented limits on the amount of money candidates for statewide or legislative office may lawfully raise and spend on their campaigns. These spending limits apply to all candidates, even those who spend their own funds. Moreover, the Act broadly defines an "expenditure" to bring within the law's regulatory purview virtually all of a candidate's activities during a campaign. Thus, campaign expenditures include not only staff, paid advertising, media, and direct mail, but also the costs of complying with the law, various personal and in-kind expenses such as the use of a candidate's own car and phone, and certain independent expenditures made by third parties. The Act limits the right of political organizations to make independent expenditures supporting a candidate by presuming that certain

expenditures are coordinated with the candidate. These "related expenditures" are treated as contributions to the candidate and count against the candidate's mandated spending limit. The Act also imposes the lowest contribution limits of any state in the country. Those limits apply equally to individuals, political parties, and committees. A separate provision limits the amount of money candidates can raise from out-of-state sources.

This case arises from three separate lawsuits filed in 1999 and 2000, which were consolidated in the district court. The plaintiffs are involved in various capacities in Vermont electoral politics and include a sitting legislator seeking re-election, candidates for future offices, political parties and political committees, and individual contributors and constituent-voters. The defendants are the State officials responsible for enforcement of the Act and a number of individuals and advocacy groups that were allowed to intervene. After a ten-day bench trial in May and June, 2000, the district court upheld many of the challenged provisions but enjoined enforcement of the candidate spending limits, the candidate contribution limits as applied to contributions from political parties, and the restriction on out-of-state contributions. P.A. 24a-26a.

All parties appealed the district court's decision to the Second Circuit. That court's initial 2-1 opinion, issued in August 2002, upheld in large part both Act 64's contribution and expenditure limits. P.A. 95a. After plaintiffs filed a motion for rehearing, the panel withdrew this opinion. *Id.* Two years later, the same divided panel of the Court of Appeals again upheld most of the provisions of Act 64, but remanded to the district court to decide whether the expenditure limits were narrowly tailored to advance the State's interests. P.A. 95a-97a. Plaintiffs' motion for rehearing en banc was denied in an order accompanied by multiple concurring and dissenting opinions. P.A. 315a-344a; J.A. at 98-110.

A. Vermont's Act 64

Expenditure limits. Act 64 limits all candidate spending during a two-year election cycle. 17 V.S.A. § 2805a. Candidates for statewide office are restricted to varying amounts depending upon the position sought: the candidate for governor is limited to $300,000; the lieutenant governor to $100,000; and candidates for other statewide offices to $45,000. *See* 17 V.S.A. §§ 2805a(a)(1)-(3).[1] Candidates for state senator and county office are limited to spending $4,000, with senate candidates permitted an additional $2,500 per seat in multi-seat districts. 17 V.S.A. § 2805a(a)(4). Candidates for state representative in single-member districts can spend no more than $2,000, and those in two-member districts no more than $3,000. 17 V.S.A. § 2805a(a)(5). These limits apply on a two-year election cycle basis, not per election, and provide for no adjustment regardless of whether a candidate has a primary. *See* 17 V.S.A. §§ 2801(9), 2805(a), 2805a(a).

The expenditure limits must be understood in the context of the Act's broad definitions. Act 64 defines "expenditures" to include a "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value . . . for the purpose of influencing an election." 17 V.S.A. § 2801(3). The breadth of this language is indisputable, and was chosen purposely to sweep all campaign activities within Act 64's regulatory scheme, thus ensuring that limits could not be avoided. Given its ordinary meaning, the language includes the value of the use of personal phones, computers, offices, rooms in residences, paper, pencils, personal automobiles, etc. P.A. 211a. The

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[1] Only candidates for governor and lieutenant governor have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions" and adhere to various other restrictions. *See* 17 V.S.A. §§ 2851-2856. These provisions are not at issue in this case.

evidence at trial and interpretative guidance provided by the Vermont Secretary of State, who is charged with administering the Act, supports a broad reading of the term "expenditure." P.A. 211a-219a.

Act 64 thus treats all manner of typical grassroots campaign activities, such as a candidate's use of her own car and food provided by supporters at "meet the candidate" events, as campaign expenditures that count toward the applicable spending limits. Candidates, therefore, as well as their volunteers, may not drive their personal vehicles for campaign purposes without accounting for the miles driven and treating the costs of that driving as a campaign expenditure. P.A. 229a-232a, 241a-242a. The use of personal phone lines, the value of donated office space or professional services, and the costs of complying with the law, are all considered to be "expenditures" under the Act. P.A. 225a-226a, 241a-242a. The spending limits – and the broad definition thereof – apply equally to candidates who exclusively use personal funds to finance their campaigns. 17 V.S.A. § 2805a(a).

Related Expenditures. Vermont's spending limits must also be reviewed in the context of the "related expenditure" provision, which counts certain expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (to be counted against the candidate's permissible budget). 17 V.S.A. § 2809. Spending is "related" when it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." 17 V.S.A. § 2809(c). The broad definition of "expenditure" applies to related expenditures as well, and the language requiring intentional "facilitation," "solicitation" or "approval" has been given a broad

interpretation by those charged with enforcing the act. P.A. 222a-223a, 308a-312a. *See* Regulation of Related Expenses, Regulation 2000-01 (Vt. Sec'y of State May 15, 2000) (Ex. II, E-0741)[2]. Spending by individual supporters may be treated as a "related expenditure" when it exceeds $50. 17 V.S.A § 2809(b).

The related expenditure provision prohibits a candidate's political party from working with the candidate whenever expenditures exceed the applicable expenditure and contribution limits. For example, a political party that has contributed the maximum $400 to its candidate for Governor cannot spend any more on related expenditures. Similarly, a political party cannot undertake any related expenditures on behalf of its candidate if the candidate has exceeded the applicable expenditure limit. Additionally, Act 64 creates a presumption that all political parties' and political action committees' expenditures that primarily benefit six or fewer candidates are, in fact, "related" expenditures – and therefore count as both contributions and candidate spending – even in the absence of any indication that such expenditures were made in coordination with any candidate. The presumption is subject to rebuttal in an enforcement proceeding. Candidates (or their opponents) may also bring a petition in state court seeking a determination as to whether particular third party expenditures should be considered "related," 17 V.S.A. § 2809(e), but any finding on such petition is not binding in a later enforcement proceeding. *Id.* Moreover, the cost of rebutting the statutory presumption is charged against the candidate's spending limit – even if the candidate succeeds in establishing that the presumption does not apply. P.A. 225a-226a.

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[2] References to trial exhibits are to the bound volumes I through VIII supplied to the Court of Appeals.

Contribution Limits. Act 64 also limits the size of contributions that candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party or political action committee. 17 V.S.A. § 2805(a). Slightly higher limits apply to candidates for state senate or county office ($300) and candidates for statewide office ($400). *Id.*[3] For the purpose of all these contribution limits, a political party's state, county and local branch (and national and regional affiliates of the party) count as a single unit. 17 V.S.A. § 2801(5). These limits apply to all cash, in-kind, and "related" contributions, following the broad definitions described above. The single limit applies during an entire 2-year general election cycle whether or not the candidate faces a primary. 17 V.S.A. § 2805(a).[4]

B. The Effects of Act 64

The evidence in this case regarding the methods, tactics, and costs of running an effective campaign for office in Vermont is detailed and specific. Plaintiffs introduced evidence from candidates, campaign managers, consultants, and experts. These witnesses based their testimony on broad experience in running statewide and legislative races in Vermont. George McNeil, for instance, was executive

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[3] Political action committees and political parties may accept no contribution greater than $2,000. *Id* The court upheld these limits. Petitioners are not seeking review of that holding.

[4] Act 64 also limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. 17 V.S.A. § 2805(c). The Second Circuit unanimously affirmed the district court's ruling that this provision was unconstitutional and no party has sought review of that issue in this Court.

director of the Republican Legislative Elections Committee, through which he advised dozens of candidates. He also worked on numerous Vermont legislative campaigns as chairman of a county Republican Committee. Tr. II-45. Steve Howard served as director of the House Democratic Committee and worked with numerous candidates in addition to his own campaigns for both houses of the legislature and for statewide office. Tr. IV-141-158. Mark Snelling played major roles in over a dozen statewide campaigns for lieutenant governor, governor, and Congress. Tr. I-22-25. Darcy Johnston managed the re-election campaign for Senator James Jeffords in 2000, and has extensive experience raising campaign funds in Vermont. Tr. I-73-75. Pat Garahan had extensive knowledge and experience regarding all levels of Vermont campaigns from his position as chair of the Vermont Republican State Committee. Tr. I-150-51. Kathy Summers was uniquely qualified to describe the impact of Act 64 on state-wide campaigns because she was managing the campaign of a gubernatorial candidate, Ruth Dwyer, in 2000 at the time of trial, and had witnessed this impact first-hand. Tr. IV-78-89. McNeil, Howard, Snelling, Johnston, Garahan, and Summers all testified that Act 64's spending and contribution limits had and would have severe adverse effects on the ability of candidates to mount effective campaigns, particularly in competitive races.

While most candidates run campaigns to win, an "effective," "competitive," or "successful" campaign cannot be solely defined by whether a candidate wins or loses a particular race; rather, an "effective" campaign can be objectively measured in terms of the ability of the candidate to communicate her message to the electorate. Tr. I-95-96; Tr. II-71; Tr.-IV-80, 106. According to plaintiffs' witnesses, a candidate is able to mount a "real" or "effective" campaign when she is able to communicate effectively to a large percentage of potential voters the candidate's name,

something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. Tr. I-95-97; Tr. IV-80; Tr. II-71. In addition, an effective campaign must also have sufficient resources to respond to particular opponents, counter potentially unfavorable press coverage, and react to issues that may arise late in a campaign. Tr. II-126. Using these criteria, and taking into account various factors including the size of the district, density of population, available media outlets, and other factors, Tr. II-72, plaintiffs' witnesses consistently testified that it would be impossible, in many races, to run an effective campaign under Act 64's spending limits. This is especially true when the expanded definition of an "expenditure" is taken into account. *See* P.A. 234a-235a.

One of the most effective means of communicating with voters is through paid mass media communications. In Vermont house and senate races these are primarily direct mail and newspaper advertisements, Tr. IV-150-156, while in statewide races, radio and television commercials are of more importance. Tr. I-100-112. The State of Vermont's witness, pollster Celinda Lake, noted that a substantial portion of Vermonters receive their information about candidates through political advertising, which they view to be important or very important in deciding how to vote. Ex. III, E-0851. As such, a candidate for state representative will be severely hampered by the spending limits (only $2,000 for a house race), which could prevent the candidate from sending even a single mailing to all voters in her district. Tr. III-11-16; Tr. IV-151-54.

Plaintiff Neil Randall, the only Libertarian in the State House at the time of trial, spent approximately $3,735 in a hotly contested race in 1998 that included a contested primary. Tr. IV-227-236; Tr. II-10. He testified that he would be unable to run an effective campaign under Act 64's limit, because it would not allow him to place as many

advertisements and make as many mailings as were necessary in this district. Tr. IV-233-40. Randall testified that the spending limits' effects are exacerbated by the application of the two-year election rule. A candidate involved in a contested primary – as Randall was – needs to spend considerably more than an opponent who faces no opposition in the primary. *Id.* at 231-240.[5] Similarly, Steve Howard testified, based on his own experience running several campaigns, that it takes approximately $4,000 to $6,000 to run an effective house campaign in many districts and much more for a senate campaign. Tr. IV-156-171. In 1998, he spent over $24,000 in his own unsuccessful bid for the State Senate in Rutland County, where the Act 64 limit is $9,000. Tr. IV-162-163. John Patch corroborated this testimony, noting that to run an effective Senate campaign in Chittenden County, a challenger would need to spend at least $25,000. Tr. II-182.[6]

The evidence showed that the low cost campaign methods favored by Act 64's supporters, such as traditional door-to-door campaigning, are difficult in some geographic regions and might be impossible for a candidate who holds another job or for one with a disability. *See* Tr. III-32; IV-234. Many people are not home when candidates visit, and given the volume of potential door-to-door visits, it is

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[5] Plaintiff Steve Howard testified that he chose not to run for Auditor of Accounts in 2000 because he would have faced a tough primary that would have left him without sufficient resources for the general election. Tr. IV-177-78. John Patch, then chair of the Democratic Party in Vermont's most populous county, testified that for this reason contested primaries would be avoided in his district through self-selection, targeted recruiting, and subtle arm-twisting. Tr. II-185-89.

[6] Chittenden County is the state's largest district, with a population of approximately 150,000. Tr. II-181. Under the Act, a non-incumbent senate candidate in Chittenden County can spend no more than $16,500 for the 2-year election cycle. 17 V.S.A. § 2805a(a)(4). A state's attorney or sheriff candidate is limited to only $4,000, or less than three cents per resident. *Id.*

impossible for a candidate to spend any type of quality time with the voters at each home. Tr. I-103-04; Tr. IV-166-168. In addition, candidates have only minimal control over "free" coverage in the news media. Their events are often not covered, and when they are, many candidates must spend extra money on paid advertising to overcome distorted or unfavorable coverage. Tr. V-75; Tr. I-106-107; Tr. IV-166-67. This is especially true for candidates who are challengers or "nontraditional," for example, openly gay candidates. Tr. IV-171-77.

Plaintiffs' witnesses also evaluated the available statistical data and experience from previous election cycles to gauge the impact of the new campaign finance restrictions. Each of these witnesses recognized that, because there are many uncontested races and straw candidates, Tr. III-37, evaluating the real effect of Vermont's Act 64 requires a focus on spending data from competitive races. Tr. II-73; Tr. VIII-139-40. Focusing on the average amount raised and spent by *all* candidates does not gauge the effect of Act 64 on candidates most in need of the resources necessary to spread their message. Tr. VIII-150-151; Tr. X-154; Tr. IV-17.[7] Nonetheless, the state justified its claim that Act 64's limits would not harm candidates by providing only mathematical averages of *all* candidates for legislative office, including approximately 100 candidates for the house who filed no campaign finance report at all because they neither raised nor spent more than $500. Ex. III, E-0975-79.

The evidence showed that Act 64's spending and contribution limits have their most dramatic, negative impact on challengers in competitive races. Plaintiffs' expert Clark Benson analyzed the contribution and expenditure data for

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[7] Indeed, experts for both the plaintiffs and the defendants agreed that examining data for targeted competitive races gives more relevant information than the average for *all* races. Tr. IV-17; Tr. VIII-150-151; Tr. X-154.

candidates for Vermont senate and house, including the loss of financial resources that would have occurred as a result of Act 64. Ex. VII, E-2354-75. Pat Garahan, the chairman of the Vermont Republican State Committee, identified the races that were considered most competitive, Tr. I-196-97, and George McNeil identified which of the candidates in competitive races would not have been able to run an effective campaign as a result of Act 64. Tr. II-60, 74-97, 99-102. Mr. McNeil's testimony shows that the results of Act 64 would be devastating to the ability of candidates, particularly challengers in competitive races, to mount effective campaigns. *Id.*; *see also* Ex. VII, E-2360, E-2490, E-2501, E-2505, E-2510, E-2528, E-2546. This testimony also highlights the unique and idiosyncratic aspects of running a campaign in different Vermont legislative districts, and shows that Vermont's "one-size-fits-all" approach to campaign regulation will prevent many candidates from campaigning as they wish, and must, to reach voters in their districts.

Similar evidence was presented regarding Act 64's limitations on statewide candidates. Darcy Johnson, Mark Snelling, and William Meub (who was a candidate for governor at the time) all testified that Act 64 would have devastating effects on the ability of statewide candidates to run effective campaigns. Tr. I-22-72, 113-119; Tr. IV-24-78. Gubernatorial candidates have regularly exceeded the $300,000 limit: as Judge Winter noted in his dissent below, the major party candidates in Vermont's last two gubernatorial elections spent double or close to triple this amount. P.A. 239a.[8] In the 2002 race for lieutenant governor,

[8] The courts below discussed gubernatorial elections in only the most general terms. Overriding issues of the day, such as education finance or civil unions, affect the manner, intensity and cost of these campaigns, which are often hotly contested. P.A. 237a-240a. In 2000, each major party candidate spent approximately $900,000, and even a third party candidate spent more than the $300,000 allowed by the Act. In 1998,

both major party candidates and a third party candidate exceeded the limits by 63%, 40%, and 38%, respectively. *Id.*

Plaintiffs' witnesses testified similarly that the $200-$400 contribution limits would hamper campaigns in competitive elections. The campaign manager for Ruth Dwyer's campaign for governor testified that Act 64's contribution limits were having a devastating impact on her ability to raise funds. Tr. IV-83-92. Had these limits been in effect in 1998, the contribution limits would have prohibited over 40% of the funds contributed to the major party challengers for governor and lieutenant governor, 36% of the funds raised by non-incumbents in senate races, and 25% of the funds contributed to non-incumbents running for house seats. Ex. III, E-970, E-976, E-978. In the most competitive legislative races targeted by political parties, many candidates would have lost half their funds. Neil Randall explained that the reduced contribution limits affect non-mainstream candidates the hardest. The Libertarian Party must draw from a smaller pool of potential contributors and thus seek larger donations from individuals within that pool to get its message out to potential supporters. Tr. IV-244-45.

In the 1998 election, challengers in eleven of the fourteen competitive state senate races targeted by the Vermont Republican State Committee would not have been able to run competitive campaigns had Act 64's $300 candidate contribution limit been in effect. Tr. II-74-92, 99-102. These candidates would have lost between $3,150 and $6,900 in raw dollars and 13% to 43.7% of their total

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Governor Dean spent $657,065 to win re-election. As far back as 1990, the late Governor Richard Snelling spent $447,478; in the 1988 election, Governor Madeleine Kunin spent even more – $639,863. In the most recent election, incumbent Governor Jim Douglas spent $681,662 against challenger Peter Clavelle, who spent $502,537. Douglas spent nearly twice that amount – $1,124,519 – when the office was open in 2002. *See* Vt. Sec'y of State, Historical Campaign Finance Database, *at* http://www.sec.state.vt.us/seek/fin_seek.htm (last visited Dec. 8, 2005).

contributions. Ex. VII, E-2354-59.[9] In the 1998 campaigns for the Vermont house, fifteen of seventeen candidates in competitive races identified at trial would not have been able to mount an effective campaign had the new $200 candidate contribution limit been in effect. These candidates would have lost between $550 and $3,761 in raw dollars and 8.7% to 54.8% in total funds because of Act 64. Ex. III, E-232-75. These house candidates would have been forced to forego substantial communications with voters had they been limited by Act 64, Tr. II-81-95, and would not have been able to make up for the contributions lost to the new limits through additional fundraising efforts. Tr. II-99-100.

In the only election completed under the Act 64 contribution limits before the trial below was held, Kurt Wright unsuccessfully challenged the incumbent mayor of Burlington in 1999.[10] He testified that Act 64's $200 contribution limit severely restricted his ability to raise funds, and that he could have raised 50% more under the old limits. Ex. VIII, E-3052-54. This loss of funds forced Mr. Wright to limit his communications with voters. He had to cancel a crucial direct mail effort and also reduced his use of radio and cable television. He was unable to pay staff to coordinate volunteers. Ex. VIII, E-3052.

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[9] The losses to these candidates were actually underestimated by plaintiffs' expert witness, Clark Benson, who treated each political party organization as a separate source, able to make a full contribution. In fact, under the "single source rule" all branches of a political party are treated as one source and in the aggregate can contribute only up to the single limit set by Act 64. 17 V.S.A. §§ 2801(5), 2805(a).

[10] The candidates for local office are constrained by the $200 contribution limit, 17 V.S.A. § 2805(a), but Act 64 does not contain any expenditure limits for mayoral, town or city offices.

C. The Proceedings Below

Spending Limits. The district court enjoined enforcement of candidate spending limits on the strength of *Buckley*. The Court of Appeals divided 2-1 on this critical issue. This decision is directly at odds with decisions of the Sixth and Tenth Circuits. *See Homans v. City of Albequerque*, 366 F.3d 900 (10th Cir. 2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998). The panel majority concluded that this Court's holding in *Buckley* "does not operate as a per se bar to campaign expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests." P.A. 91a.

The majority found that Vermont's spending limits were supported by two government interests that it regarded as compelling, at least in tandem: limiting the time that candidates spend on fundraising and addressing the corrosive effect of public cynicism on the electoral process, which the court characterized as a form of corruption. P.A. 144a-146a.

The majority next turned to the issue of whether the spending limits established by Act 64 allow for "effective advocacy." Using a test developed in the contribution limit context, the court found that the expenditure limits were not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." P.A. 152a-157a (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Although the Court of Appeals recognized that there was conflicting evidence submitted at trial, it reviewed historical data from "average" races in which spending was reported under the prior law, and found many candidates spent within the limits of the new law. Thus, according to the majority below, most candidates would not be hampered by the new limits. P.A. 153a-154a.

Finally, the majority considered whether the Act's expenditure limits were narrowly tailored to advance the

State's asserted interests. Because it could not determine whether other, less restrictive alternatives could achieve the same goals of preserving candidate time and diminishing public cynicism, the court remanded the case to the district court for further proceedings. P.A. 164a-168a.

Judge Winter forcefully dissented from both the majority's assessment of the evidence and its legal conclusions. P.A. 190a-194a. At the most fundamental level, he disagreed with the majority's view that the constitutionality of spending limits remains an open question after *Buckley*. P.A. 207a, 258a, 265a. In addition, he noted that the record did not, in fact, support the majority's assertion that fundraising in Vermont was unduly burdensome on candidates and officeholders. The only evidence presented on this issue was purely anecdotal and described brief periods of time or the general distaste that some candidates may have for fundraising. *E.g.*, Tr. IX-151. As Judge Winter recognized, it is easy to state that candidates spend too much time fundraising, but "it is not a testable proposition." P.A. 274a.

Judge Winter also sharply criticized the majority's reliance on "average" spending to determine whether Vermont's spending limits would impair a candidate's ability to engage in "effective advocacy," since the use of an average inevitably obscures the critical difference between contested races and uncontested races, and favors incumbents. P.A. 236a-240a.[11] Additionally, Judge Winter

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[11] Act 64 does attempt to ameliorate the incumbent's advantage by providing that incumbents running for re-election may only spend 85% or 90% of the standard limits, depending on the office sought. 17 V.S.A. § 2805a(c). The evidence at trial showed that the legislature chose these percentages arbitrarily, with no empirical basis. Tr. VII-98-100; Tr. X-99. Circuit Judge Jacobs referred to this provision as a "fig leaf" that "just shows that the legislature understood that offense is better than defense; not a word in the record suggests that this marginal differential is sufficient to overcome the numerous and powerful advantages of

noted that the majority's comparison with historical spending rates failed to take into account the expanded definition of an "expenditure" under Act 64, including related expenditures and the costs of compliance. P.A. 233a-235a. Judge Winter pointedly disagreed with the majority that the test for effective advocacy developed in the contribution limit context – the "level of notice" standard – had any applicability to the constitutionality of spending limits. Where a direct restriction on speech is concerned, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice." P.A. 282a-285a.

And, unlike the majority, Judge Winter saw no need for a remand to explore less restrictive alternatives. That issue was decided by *Buckley*, which held that spending limits are not the least restrictive means of advancing the government's interest in preventing corruption or its appearance. 424 U.S. at 58-59. Judge Winter explained, moreover, that it was "self-evident" that the State could, if it chose, promote its asserted interests through "a combination of public and private funding with low contribution limits." P.A. 193a-194a, 292a, 300a.

Related Expenditures. The related expenditure provision establishes a statutory presumption that certain independent expenditures by political parties and political committees are coordinated with the candidate. They are automatically treated as contributions to the candidate and also count against the candidate's expenditure limits. § 2809(d) The burden rests with the candidate (or contributor) to prove otherwise. *See* 17 V.S.A. § 2809(e) (civil proceedings in state court); § 2806a (civil investigative powers of the state); § 2806 (criminal penalties for failure to report). The district court upheld the related expenditure

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incumbency." P.A. 339a; *see also* P.A. 275a, 285a-286a (Winter, J., dissenting).

provision of § 2809(d) as to contributions, relying on the theory that the presumption of coordination could be rebutted. P.A. 85a. The district court struck down the provision treating related expenditures as candidate expenditures after deciding that limits on candidate expenditures were per se unconstitutional. *Id.*

A majority of the Court of Appeals found no constitutional problem with the related expenditure provision as applied to contributions, much for the same reason as the district court. Giving the statutory language a narrow reading, the court reasoned that a candidate could rebut the presumption of coordination in any enforcement proceeding by simply testifying that she had not "facilitated," "solicited," or "approved" the expense. P.A. 184a. However, the majority remanded the question of related expenditures as it affects a candidate's spending limit, because the district court, having held spending limits unconstitutional, had not separately analyzed this issue. P.A. 168a.

In dissent, Judge Winter would have found § 2809(d) unconstitutional because it places an undue burden on candidates to disprove coordination of independent expenditures under a regime in which the costs of defending oneself also count against the limits. P.A. 222a-228a. Judge Winter also found the narrowing construction adopted by the majority to be at odds with advice given by Vermont's Secretary of State, who is charged with administering the law. P.A. 225a, 308a-312a. As such, the related expenditure provision would work untold mischief and chill much protected political speech by requiring candidates, parties, and supporters to speak and act only at their peril. P.A. 222a-225a, 289a.

Contribution Limits. The district court upheld the contribution limits as to individuals and political committees, finding that they advanced the State's interest in preventing

corruption or its appearance. P.A. 52a-62a, 77a-80a. The court struck down the limits as applied to political parties, finding the $200, $300 and $400 amounts to be so low that they would essentially remove political parties from their traditional, historical role in elections. P.A. 72a-76a ("Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."). The Court of Appeals, relying on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 480-82 (2001) (*Colorado II*), felt there was no basis to distinguish between political parties and individuals or other organizations. P.A. 177a-181a. Accordingly, the court reversed the district court and upheld the constitutionality of all Act 64's contribution limits. P.A. 168a-181a.

In so holding, the court again relied on evidence from "average" contributions in prior elections. P.A. 170a. The court ignored plaintiffs' evidence that such mathematical averages mask the harm caused to many candidates, particularly in the most seriously contested elections and particularly to non-incumbents and "non-traditional" candidates. Chief Judge Walker, in his opinion dissenting from the denial of rehearing en banc, was especially critical of the court's holding in this regard. He characterized the contribution limits as "laughably low," and opined that these limits, when considered in combination with the Act's expenditure limits, "are set so low and in such a fashion that only a desire to protect incumbents can explain them." P.A. 330a-331a. Indeed, the court fails to even discuss the evidence showing that the contribution limits were adopted primarily to advance the State's goal of curbing campaign spending. *See* 1997 Vt. Laws Pub. Act 64, §§ 1(a)(4), (5), (10) (legislative findings).[12] Nor did the Court consider

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[12] The original version of the bill contained these contribution limits, but no mandatory spending limits. Ex. I, E-0001-0025. Nonetheless, then-Governor Howard Dean praised the bill because it "limits the amount of

whether existing limits were sufficient to further the state's anti-corruption interest. Before Act 64, candidates were limited to contributions from individuals of no more than $1,000 per election ($2,000 per cycle when a primary is held). 1988 Vt. Laws Pub. Act 263, § 3. There was no evidence at trial that these limits failed to deter corruption.

In reversing the district court's ruling on party contribution limits, the Court of Appeals overlooked the fact that the district court's validation of the Act's individual contribution limits was inevitably tied to that court's ruling that the limits on party contributions to candidates were unconstitutional. The district court's order allowed political parties to make larger contributions to candidates and thus moderated, to some extent, the effect of the low individual contribution limits. P.A. 72a-76a. Under the Second Circuit's ruling, however, even parties can give no more than the $200-$400 limits. This restriction arbitrarily deprives candidates of critical sources of campaign funds.[13]

SUMMARY OF ARGUMENT

Act 64 reflects the philosophy of its proponents that government ought to regulate political speech the way it regulates public utilities. P.A. 195a. The Act suppresses ordinary political activity at every level and represents a complete abandonment of the First Amendment's standard of

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money candidates can spend in both primary and general elections." Ex. III, E-0903. The record shows clearly that the legislative purpose was "to reduce and control expenditures on election campaigns" even before the spending limits were added to the bill. Ex. VIII, E-2839, E-2894 (testimony of principal legislative sponsor), *see Id.* at E-2813 (statement of legislative counsel).

[13] In contrast to the federal system, there is no separate allowance for coordinated expenses between political parties and their candidates. *See* 2 U.S.C. § 441a(d) (providing for coordinated expenditures by political parties over and above direct contributions made to a candidate).

a free, robust discussion in which citizens retain control over the quantity and range of debate on public issues in a political campaign. *Buckley*, 424 U.S. at 52-53. It is therefore not surprising that Act 64's expenditure limits were adopted as a vehicle to challenge *Buckley*'s central premise, that while it is permissible to limit campaign contributions, the expenditure of funds for core political speech cannot be restricted based on the government's conception of how much speech is needed. This Court has never retreated from *Buckley*, *see Colorado II*, 533 U.S. at 441, and there is nothing unique about Vermont elections that would support so radical a departure from the principles that emerged there. The arguments adopted by the Second Circuit were all explicitly rejected by the *Buckley* Court on a far more thorough record than that compiled here.

The Second Circuit attempted to avoid *Buckley*'s binding precedent by redefining the State's anti-corruption rationale in terms of public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. The court asserted that *Buckley* had not fully considered this issue or the subsidiary issue of whether spending limits could be justified by the State's alleged interest in reducing the time spent on fundraising. In fact, *Buckley* speaks much more directly to these issues than the Second Circuit acknowledged. The *Buckley* Court categorically rejected the argument that the state has an interest in regulating the spending of money legally raised by candidates. 424 U.S. at 55-56.

No amount of "fine-tuning' will remedy the statute's restraint of core political speech. *Buckley* has already established that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. *Id.* at 58-59. But even if the Second Circuit were correct that preserving the time of candidates and combating real or apparent corruption are sufficiently compelling interests to justify the burdens posed

by spending limits, Vermont's limits should still be struck down for lack of tailoring. Any expenditure ceiling – especially one that uses past average expenditures as the relevant guide – will necessarily restrict the spending of some candidates to ensure that other candidates are not outspent. This approach sweeps too broadly to withstand the "exacting scrutiny" required by *Buckley*.

Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. This related expenditure provision presumes these independent expenditures are the candidate's own speech and counts them as both contributions to the candidate and expenditures by the candidate – subject to the relevant limitations. Although the presumption can be rebutted, it places an undue burden and expense on candidates to disassociate themselves from independent expenditures over which they have no control. This approach to regulating independent expenditures was rejected in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (*Colorado I*). Conversely, the Act imposes no limit on "unrelated" independent expenditures, meaning that a candidate's own speech can be overwhelmed by non-candidate speakers in a constitutionally perverse form of speaker-based discrimination.

Finally, Act 64's contribution limits are so low as to raise the question whether they were adopted to combat real or perceived corruption, or whether they were adopted for the impermissible goal of reducing overall campaign spending. Nothing in the record suggests that the modest pre-existing limits were ineffective. The completely unjustified adoption of the limits on a per cycle basis raises the additional prospect that the limits were adopted by the

legislature out of self-interest. Moreover, by treating political parties and committees as if they were individual contributors, the limits trample the weighty associational interests at stake when individuals come together for a common political purpose. As the record demonstrates, Act 64 will prevent many candidates from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

Under any conception of the First Amendment, Act 64's limits are unconstitutional. The limits cannot withstand the "exacting scrutiny required by the First Amendment." *Id.* at 16, 44-45. *Buckley* rejected, in the most explicit terms, the contention that the Government may limit the amount of political speech by candidates and ordinary citizens. Act 64's limits take aim at core political expression on the theory that the state has the right to determine how much political speech is necessary and appropriate. The interests advanced in support of the statute are at best a reformulation of the interests identified and rejected in *Buckley*. Those arguments are no more persuasive now than they were when the Court first rejected them in 1976.

Even if Vermont can show a compelling interest that is distinct from those considered in *Buckley*, Act 64's limits are so low that they cannot reasonably be said to be narrowly tailored. The test adopted by the Court of Appeals – whether the limits are so low that they prevent "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice" – is not applicable to direct restraints on speech, much less core political speech. At a minimum, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice."

A. *Buckley* Categorically Rejected Limits on How Much Candidates Can Spend to Promote Their Own Candidacies

Buckley held, without qualification, that government may not limit campaign expenditures by candidates for electoral office. 424 U.S. at 45. Act 64 limits such expenditures, notwithstanding *Buckley*. Indeed the proponents of Act 64 never doubted its unconstitutionality and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*. P.A. 202a n.2. Act 64's limits on expenditures violate the First Amendment because they limit a broad spectrum of political speech and activity.

The activities limited by Act 64 are the ordinary stuff of democracy and the core conduct protected by the First Amendment. There is "practically universal agreement that a major purpose of [the First] Amendment was to protect" political speech. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Candidate speech is entitled to special protection not just because candidates have an individual right "to engage in the discussion of public issues and vigorously and tirelessly to advocate [their] own election and the election of other candidates," *Buckley*, 424 U.S. at 52, but also because it is vital to the community's interest in appraising a candidate's qualifications for public office. As the Court explained in *Buckley*, "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53. This exchange between candidate and voter is at the heart of democratic self-governance.

Because money is needed for access to the means of communication, *Buckley* held that any limit on the use of money for political speech is a limit on that speech. 424 U.S. at 19. Political speech without an audience is not worth the

effort. Political speakers must go to where voters are or speak through a medium that voters watch or hear. As explained by Judge Winter in dissent below, a candidate who has reached Act 64's limits on expenditures may not even drive the family car to a town green to make a speech. She is as effectively barred from speaking, as she would be if the law flatly prohibited it. P.A. 197a. In *Buckley*, the Court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.

424 U.S. at 19.

It has been nearly thirty years since this Court held in *Buckley* that political spending is protected First Amendment activity. The starting point for every subsequent decision by the Court has been to determine whether the law at issue regulates political contributions or political expenditures. The latter are entitled to greater constitutional protection for the reasons set forth in *Buckley*: "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 20. In contrast, expenditure limits place direct restraints on speech. *Id.* at 19. Because of these

differences, the Court has since explained, "we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." *Colorado II*, 533 U.S. at 441-42 (internal citations omitted).

Thus, while the Court has held that the prevention of corruption or the appearance of corruption constitutes a sufficient governmental interest to limit contributions to candidates, *see Buckley*, 424 U.S. at 25-28, it has rejected the argument that the spending of money legally raised by candidates poses a risk of corruption. *Id.* at 55-56. The Court found the government's interest in preventing corruption or its appearance was largely alleviated by reasonable limits on contributions and disclosure requirements. *Id.* at 58-59. With sufficiently low contribution limits, the Court suggested the danger of corruption would disappear altogether. *Id.* at 56 n.64 (quoting, with approval, a circuit court dissenter's position that "[i]f a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none.").

The Court also dismissed the argument that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is compelling or sufficient enough to justify restrictions on campaign spending:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57.

Nothing has changed since *Buckley* to alter this Court's fundamental conclusion that expenditure limits "place substantial and direct restrictions on the ability of candidates . . . to engage in protected expression." *Id.* at 58-59. In reaching this conclusion, the *Buckley* Court relied on data showing how the proposed federal limits would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major-party presidential candidates. *Id.* at 20 n.21, 55 n.62. The record in this case shows that the expenditure limits imposed by Act 64, if implemented, would have at least as significant an impact in both legislative and statewide elections as the statute at issue in *Buckley*. P.A. 237a-240a.[14]

The Second Circuit did not dispute this evidence or the significance of similar evidence in *Buckley*. Instead, it reframed the issue to ask whether the Vermont limits are so low that they prevent "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice." P.A. 156a-157a. (quoting *Shrink*, 528 U.S. at 397). Additionally, the court relied on average past expenditures as the relevant guide for establishing the threshold "level of notice." *Id.* The court then adopted the district court's finding that Act 64's limits on campaign expenditures were based on past experience and, with limited exceptions, are substantially the same as "average" expenditures by candidates in the past. *Id.* Based on these findings, the Second Circuit concluded that the limits are not so "radical in effect" that they prevent candidates from "amassing the resources necessary for effective advocacy." *Id.*

The problem with the approach taken by the Second Circuit is that the "effective advocacy" standard utilized in

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[14] *See also* pp. 9-12 *supra*.

the context of cases discussing contribution limits, *Shrink*, 528 U.S. at 395-96, has no place in the different context of expenditure limits under this Court's jurisprudence. Applied to expenditure limits, the "effective advocacy" standard is essentially a one-size-fits-all approach that allows government to silence candidates above a minimum level. Importing the *Shrink* standard into the expenditure limit context disregards the sharp contrast this Court has drawn between expenditure limits and contribution limits. Whereas contribution limits "entai[l] only a marginal restriction on the contributor's ability to engage in free communication," *McConnell v. FEC*, 540 U.S. 93, 134-35 (2003) (quoting *Buckley*, 424 U.S. at 20), "limitations on "expenditures [are] direct restraints on speech," *Id.* at 120. The decision in *Shrink* stands as a safeguard against unreasonably low contribution limits that might prevent otherwise viable candidates from raising enough money even to be noticed. That decision, however, does not stand for the different proposition that candidates who have raised legal contributions can be prevented from spending more than what the government believes is needed to reach the minimum "level of notice." *Buckley* rejected this proposition outright. 424 U.S. at 56-57.

Finally this Court rejected the argument that the government's interest in equalizing the financial resources of candidates in order to level the playing field justifies limiting the amounts that candidates for office may spend to promote their candidacies. *Id.* at 45, 54, 57. The arguments raised by the Government in *Buckley* about the inequalities of private economic power were not an explicit factor in the decision below, but these arguments are implicit in the court's adoption of the "effective advocacy" standard for measuring the burden Act 64 places on candidates.[15] A state that wishes

[15] The defendants and the intervenors are more direct. They explicitly rely on this argument in their Conditional Cross-Petition for Writ of

to facilitate the campaigns of under-funded candidates can adopt a public financing scheme. Expenditure limits, by contrast, are designed to inhibit speech, not to enhance it.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.

Id. at 48-49 (internal quotation marks omitted.)[16]

Buckley is a deeply entrenched part of our political landscape. In case after case, the Court has rejected government efforts to impose expenditure limits on candidates, ordinary citizens, or groups. It has stated the clear and unequivocal rule that the Constitution "grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures." *Colorado I*, 518 U.S. at 618 (rejecting attempts to regulate political party expenditures); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down a segregation requirement for political expenditures by non-profit organizations); *FEC v. Nat'l Conservative Political*

Certiorari (No. 1697) at 4 (incorporating arguments from intervenors' response and partial opposition brief).

[16] The Court has also stated that "the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S at 56-57.

Action Comm., 470 U.S. 480 (1985) (striking down expenditure limitations on political action committees); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978) (striking down a statute forbidding banks and business corporations from making certain political expenditures).[17]

There is nothing unique about Vermont elections that supports such an abrupt and radical departure from the principles established in *Buckley*. The Court of Appeals' decision erroneously proceeds on the assumption that the First Amendment judgments made in *Buckley* are no longer valid. Just the opposite is true. The Court's campaign finance jurisprudence on this issue has been remarkably constant for three decades and has unfailingly affirmed the holding in *Buckley* on the unconstitutionality of expenditure limits.

B. Even if *Buckley* Does Not Categorically Reject Mandatory Expenditure Limits, Act 64's Limits Violate the First Amendment

The Second Circuit correctly framed its First Amendment analysis as involving a content-based regulation of speech because Act 64 targets expenditures made "for the purpose of influencing elections." P.A. 118a-119a (citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (treating election provisions as content-based because "whether individuals may exercise their free speech rights . . . depends entirely on whether their speech is related to a political campaign")). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In addition, Act 64's limitations depend on the identity of the speaker, which is an independent basis for applying strict scrutiny. *See Belotti*, 435 U.S. at 785. That is

[17] The only direct restraint of political expenditures thus far upheld by the Court involved political expenditures by corporations and labor unions. *See Austin v Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell, supra*.

especially true in this context. Only candidates are subject to the expenditure limits. As a result, other unregulated speakers are allowed to say more about the candidates than the candidates themselves.

To uphold a content-based restriction on speech, the Government must demonstrate a compelling state interest to support the restriction, and show that the restriction is narrowly tailored to advance that interest. *Austin v. Mich. Chamber of Commerce,* 494 U.S. at 657. Act 64 fails that test.

1. Act 64's Expenditure Limits are not Supported by a Compelling Interest

Act 64 was adopted as a broad-based regulatory scheme intended to reduce campaign spending and overturn *Buckley*. Its asserted goals were to restore public confidence in government and reduce the time spent on political fundraising.[18] The Act's fatal flaw is to presume that less political advocacy is better than more, and that the government knows best how candidates should run their campaigns. This Court has consistently rejected that paternalistic assumption. *Buckley*, 424 U.S. at 57.

In an effort to distinguish its decision upholding expenditure limits from what has been understood for thirty years as the contrary holding in *Buckley*, the majority below argued that the *Buckley* Court had not considered the specific state interests asserted by Vermont in this case. It then identified those interests as preventing public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. These interests were broadly envisioned by the court to include eliminating special access or the appearance of special access of donors to office-holders, reducing the influential or agenda-setting effect of

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[18] This latter interest is undermined, of course, by the Act's unreasonably low contribution limits. *See* p. 33, *infra*.

"bundled" contributions, freeing candidates from the rigors of fundraising, and increasing citizen confidence in the electoral process. Fairly read, however, *Buckley* correctly rejected all of these interests as insufficient to justify expenditure limits on the political speech of candidates, parties, and involved citizens.

As described in Judge Winter's dissenting opinion below, the *Buckley* Court had before it a full record of campaign practices and abuses, including the issue of special donor access – when it declared expenditure limits unconstitutional. P.A. 259a-262a. As Judge Winter further observed, having held that neither corruption nor the appearance of corruption was sufficiently compelling to justify expenditure limits, the *Buckley* Court hardly had to go on to say that access, or the appearance of access, was also not a compelling justification to limit expenditures. P.A. 259a. Similarly, the practice of "bundling" or pooling contributions was relied on by the proponents of the federal law at issue in *Buckley* as evidence of improper influence by particular industry groups and was before the Court in *Buckley*. 424 U.S. 32-34 nn.35-40. By comparison, Act 64's record is remarkably weak. The claims of widespread improper influence are not supported by the record here. To the contrary, it is clear from the record that Vermont elections are relatively low-budget affairs that hardly leave candidates obsessively dependent on contributors to offset skyrocketing campaign costs.

The Second Circuit nonetheless relied on the corruption rationale by linking it with what it characterized as a separate state interest in freeing candidates from the time-consuming demands of fundraising. The idea is that the extra time will be spent conferring with "ordinary citizens," rather than the so-called "special interests" upon which candidates are alleged to be obsessively dependant. As an initial matter, the record does not support the State's contention that fundraising is extremely burdensome for

Vermont candidates. There is absolutely no evidence in the record quantifying the time spent by candidates, nor is the proposition self-evident. Indeed, if average past expenditures are any guide, it can hardly be said that candidates for Vermont's part-time legislature are preoccupied with raising large amounts of campaign funds.

The State's asserted interest in limiting campaign spending as a means of promoting equal access to public officials is likewise irreconcilable with *Buckley*'s holding that expenditure limits cannot be sustained as a means of deterring corruption. As Judge Winter observed: "Reducing bribes is generally regarded as a far more compelling interest than reducing phone calls." P.A. 259a. Moreover, there is nothing inherently improper or invidious when elected officials meet with representatives from industry groups and advocacy organizations like the NRA or AARP. Similarly, the *Buckley* Court was well aware of the argument, embraced by the Second Circuit, that politicians spend too much time on fundraising.[19] Analytically, those arguments are not legally distinct from the broader interest, rejected in *Buckley*, of controlling campaign costs. Doctrinally, the Court has held that the First Amendment denies government the power to determine that spending to promote one's political campaign is wasteful, excessive, or unwise. *Buckley*, 424 U.S. at 57. The time spent fundraising is an obvious, direct result of campaign costs and cannot serve as a separate basis for limiting campaign spending.

Even if the time-consuming nature of raising funds were a distinct state interest, Act 64 actually makes fundraising more difficult. The expenditure limits have been adopted in tandem with possibly the lowest contribution limits in the country. Limiting the size of individual

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[19] Judge Winter's opinion provides ample support for this point. P.A. 263a-265a (collecting citations to the record, the briefs of the parties, and the lower court opinion in *Buckley*).

contributions necessarily increases the amount of time that must be spent raising a particular amount of money. Vermont has manufactured the problem it now seeks to remedy. The majority below recognized that such low contribution limits would actually require candidates to spend more time fundraising, thus in a circular way justifying the Act's low spending limits as well. P.A. 150a-151a. In his dissent from denial of rehearing en banc, Chief Judge Walker recognized that a statute cannot be justified "based on problems that the statute itself creates." P.A. 331a.

Finally, some of Act 64's limitations on political advocacy are unconstitutional because no governmental interest has been offered to justify them. These include the two-year cycle for limits on expenditures (and contributions) and the imposition of expenditure limits on candidates' self-funded campaigns. Even accepting the reasons identified by the Court of Appeals as justification for Act 64's limits, a two-year cycle does not advance these interests. Collapsing primary and general elections under a single expenditure limit suppresses speech for no asserted reason. Additionally, no reason is given for applying expenditure limits to candidates who desire to fund their own campaigns. Such candidates are obviously not excessively dependent on interest groups and need not spend excessive time fundraising. Again, speech is suppressed for no reason. *See Buckley*, 424 U.S. at 44-45.

2. Act 64 is not Narrowly Tailored to Advance the Interests Asserted by the Legislature

Even if the Second Circuit were correct that the State had proven sufficiently compelling interests to justify the burdens posed by spending limits, the court unnecessarily remanded the case to determine whether the specific expenditure limits adopted by the legislature were narrowly tailored to serve those interests. As the Second Circuit itself

recognized, this inquiry is essentially twofold. First, the State must prove that the type of regulation chosen was the least restrictive – that is, that no other type of regulation could have advanced the interests asserted while impinging less on First Amendment rights. Second, the least restrictive alternative inquiry requires scrutiny of the basis for the particular spending limits chosen. P.A. 157a-158a.

Buckley already establishes that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. 424 U.S. at 58-59. As *Buckley* explained, contribution limits and disclosure requirements are the "primary weapons" against the reality or the appearance of improper influence. *Id.* at 58. There is nothing in the record of this case to suggest that Vermont's contribution limits are not sufficiently low to dispel any possibility of corruption or its appearance. *See Id.* at 55 (holding that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions," and therefore does not justify spending limits). Moreover, there is nothing in the record to suggest that disclosure of amounts and source of a candidate's campaign funds, in conjunction with appropriate contribution limits, and/or a form of public financing, would not adequately advance the State's interests.

Additionally, the Second Circuit erred in treating average past expenditures as the relevant guide for determining whether Vermont's current expenditure limits are narrowly tailored. First, the candidate disclosure reports filed under Vermont law for past elections vastly understate the level of spending under Act 64's two-year election cycle and its new, much broader, definitions of expenditures and related expenditures.[20] Even the Second Circuit recognized this. P.A. 163a n.23. For example, under prior law, there

[20] 17 V.S.A. § 2801 (3); *see* pp. 4-6, *supra*.

was no provision regarding related expenditures, and candidates routinely relied on support from political parties and committees. Under Act 64, the value of such support must be treated as a candidate expenditure. 17 V.S.A. §§ 2809(c)-(d). The value of these previously unreported expenditures itself makes past spending reports irrelevant.

Second, the use of average expenditures from past elections inevitably yields expenditure levels that strongly favor incumbents, whose official duties often overlap with their re-election efforts. Incumbents have political capital to spend that must be purchased or earned by their opponents. Incumbents also benefit from the adoption of the expenditure limits on a per-cycle basis, because they often do not face a primary opponent.[21]

Third, the average of past expenditures is calculated by including straw candidates, minor party candidates and legislative elections that were not seriously contested, or perhaps not contested at all – elections in which little communication took place and little was spent. Campaign finance reports of Vermont candidates provide ample evidence that in contested elections many candidates spent well in excess of Act 64's limits. P.A. 239a-240a. Of course, different legislative districts may require different modes of communication, which will, in turn, differently affect the cost of communications.[22]

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[21] The legislature's clumsy attempt to lessen the advantages of incumbency was both arbitrary and inadequate. *See* n. 11, *supra*.

[22] Even the slightly higher limits adopted for legislative candidates in multimember (at large) districts are irrational. In those districts, although candidates are permitted to exceed the limits established for candidates in single member districts, the extent to which they are permitted to do so is not directly proportionate to the size of their districts. 17 V.S.A. § 2805a(4) (candidates for state senator in single-member districts can spend $4,000, and candidates in multi-member districts can spend an additional $2,500 per additional seat); § 2805a(5) (candidates for state representative in single-member districts can spend $2,000, and candidates in two-member districts can spend an additional $1,000). The

Fourth, past averages have almost nothing to do with the communication needs in elections in which candidates strongly disagree over issues that divide large portions of the public and a clear-cut attempt is being made to alter governmental policies on those issues. It is the non-average election that is often the historic election, the one in which the outcome is heavily contested, the debate is most widespread, the public interest is at its highest, and the most money is spent. In dissent, Judge Winter makes all these observations to support his conclusion that average past spending has little relevance unless the goal is to disadvantage challengers. P.A. 235a-238a.

Finally, a remand to fine-tune the limits would be futile. Any ceiling on expenditures – especially one that uses past average expenditures as the relevant guide – will necessarily restrict the spending of some candidates to ensure that other candidates are not outspent. This approach sweeps too broadly to withstand the "exacting scrutiny" required under *Buckley*, since no amount of "fine-tuning" will remedy the statute's unconstitutional restraint of core political speech in those circumstances in which the candidate determines that further speech is necessary to fully convey his or her political message.

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candidate in a two-member district is trying to get votes from approximately twice as many voters as is the candidate in a single-member district, but is not allowed to spend twice the amount of money. There was no empirical basis for these provisions, which the legislature chose arbitrarily.

II. ACT 64'S TREATMENT OF INDEPENDENT EXPENDITURES AS CANDIDATE EXPENDITURES AND CONTRIBUTIONS VIOLATES THE FIRST AMENDMENT

Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. Under this "related expenditure" provision, these independent expenditures are regarded as the candidate's own speech and counted as both contributions to the candidate and expenditures by the candidate – and subject to the relevant limitations.

It is axiomatic that Supreme Court precedents prohibit limitation of independent expenditures. *See Buckley*, 424 U.S. at 45-47; *Colorado I*, 518 U.S. at 615-16. Because of the constitutional difference between independent expenditures and contributions, it is not constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions. *Colorado I*, *supra*. Although the presumption is rebuttable, the burden is on the party or candidate to challenge it, and the litigation expenses also count against the candidate's expenditure limits. This Court has struck down similar presumptions because they subjected persons exercising First Amendment rights to potential litigation in which they would "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988). Such a scheme "must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.* The effect of the statutory presumption is to place an undue burden and expense on candidates to disassociate themselves from independent expenditures over which they have no control. This approach

to regulating independent expenditures was rejected in *Colorado I*.

A political party that independently sends out a mailing endorsing its candidate for Governor, and costing a modest $500, will have exceeded the allowable contribution limit and be completely foreclosed from making any additional expenditures or direct contributions.[23] Both the party and the benefiting candidate are presumed to have violated the law and are subject to penalties of up to $10,000 per incident. 17 V.S.A. 2806 (b). The $10,000 penalty for violation of the expenditure or contribution limits "hovers over [candidates and political organizations] like the proverbial sword of Damocles" and imposes a heavy burden on political speech. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 881 (1997). A candidate who is not willing to risk prosecution is effectively silenced.

Moreover, the Act's presumption of coordination is by definition not narrowly tailored since the State's purpose is already served adequately by the same statute's provision that properly treats expenditures that are actually coordinated as contributions. 17 V.S.A. § 2809(c). The problem is aggravated by another provision of the Act that treats all the committees of a political party as a single entity for the purposes of the contribution limits. 17 V.S.A. § 2801(5). A town or county committee of a political party can make an independent expenditure for an amount near the contribution limit, choose not to rebut the presumption, and thereby bar every other town, county, state, and national committee of that political party from making a contribution of any size to that candidate. As the Court recently explained in striking a federal law that required political parties to choose between

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[23] Because the contribution limits are lower than the expenditure limits, treating "related expenditures" as contributions to the candidate is actually more restrictive than treating them as expenditures by the candidate.

independent expenditures and coordinated expenditures, and then treated all political parties as one for the purposes of the election: "[g]iven that provision, it simply is not the case that each party committee can make a voluntary and independent choice." *McConnell*, 540 U.S. at 218. To the contrary, the Court pointed out, "the decision resides solely in the hands of the first mover, such that a local party committee can bind both the state and national parties to its chosen spending option." *Id.*

In addition, the related expenditure provision violates the First Amendment by misattributing independent speech to a candidate who was uninvolved in its making. As the Eighth Circuit has held, such a presumption "eliminat[es] the independent nature of the speech and thus diminish[es] its value." *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 967 (8th Cir. 1999). For all the reasons advanced in Judge Winter's dissenting opinion, the related expenditure provision is also fraught with vagueness, uncertainty, and the potential for untold mischief. P.A. 223a-226a.

Vermont cannot rely on its related expenditure provision to accomplish indirectly what it is prohibited from doing directly – curtail expenditures made independently of the candidate and his campaign.

III. ACT 64'S LIMITS ON CONTRIBUTIONS BY INDIVIDUALS AND POLITICAL ORGANIZATIONS VIOLATE THE FIRST AMENDMENT

Campaign contributions advance political association by allowing individuals and groups to affiliate with political candidates and "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. Unlike restrictions on political expenditures, however, contribution limits have been treated

as "marginal" speech restrictions. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). As a result, the Court has consistently applied less rigorous scrutiny to limits on how much individuals and organizations can contribute to political candidates. Contribution limits pass muster if they are "closely drawn" to prevent actual or perceived corruption. *Shrink*, 528 U.S. at 387-88. The "closely drawn" standard entails a two-part analysis. First, the Court must satisfy itself that the new limits are necessary to address these interests. Second, if satisfied that the pre-existing limits were inadequate, the Court must still determine whether the new limits are set at levels that prevent candidates from "amas[sing] the resources necessary for effective advocacy." *Id.* at 397. Although a court has no "scalpel to probe" whether a higher limit might serve as well as the one adopted, distinctions in degree can be significant when they amount to differences in kind. *Buckley*, 424 U.S. at 30.

Unlike limits that have been upheld elsewhere, Vermont's contribution limits are structured primarily to limit spending. There was no evidence that the pre-existing limits were inadequate to prevent corrupt practices or the perception that large, unregulated campaign contributions exerted a corrosive influence on Vermont politics. The limits are the lowest in the nation for elected state office and were established at levels that directly correspond to the expenditure limits. Some legislative candidates are limited to as little as $200 from any single source, including her own party, for an entire two-year election cycle, meaning that a contributor who gives her favorite candidate $200 in a hotly contested primary is prohibited from providing any new assistance to the candidate in the general election. Even gubernatorial candidates can accept only $400 every two years. Contributions from political parties are restricted still further in that the state, county, and town committees of a political party are treated as a single entity. Hence, the entire Republican, Democratic, and Libertarian Parties of Vermont,

with all their local committees, may only give $400 each to their respective gubernatorial nominees.

Act 64 will inevitably stifle speech and thwart the ability of many candidates to run effective campaigns. Instead of directly targeting contributions from the sources thought to exert improper influence, Act 64 takes aim at the modest contributions made by friends, business associates, political parties, and political committees that were permissible under the pre-existing limits. Even if Vermont has a sustainable interest in regulating contributions so broadly, there is no justification for enforcing the limits on an election cycle basis.

A. There is No Evidence That Would Justify Act 64's Exceedingly Low Contribution Limits

In *Buckley*, the Court upheld the $1000 per election limit on individual contributions to candidates for federal office as a permissible means of combating the potential for corruption. The limit approved by the Court focused precisely on the problem of large campaign contributions and the narrow aspect of political association where the actuality and potential for corruption had been identified in the record. Based on a similar record involving tens and hundreds of thousands of dollars in single-source contributions, the Court upheld comparable limits adopted by the Missouri legislature to address what was perceived by the public as "politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. No similar record exists in this case. The Vermont limits were not adopted in response to a system of unregulated and unrestrained campaign giving like those identified in *Buckley* and *Shrink*. Vermont's pre-existing limits were in effect for more than 25 years and worked remarkably well in a state where elections are relatively low-budget affairs. By some

measures, Vermont ranks 49th out of the 50 states in political spending. J.A. 40-43. The large contributors that the district court accepted at face value as poisoning the system do not exist.

The single interest identified by the Court as sufficient to justify contribution limits is the State's interest in preventing corruption or the appearance of corruption that may flow from large campaign contributions. *See Buckley*, 424 U.S. at 25-27; *Shrink*, 528 U.S. at 389-395. Plaintiffs recognize that there is no minimum number that is categorically suspect. However, limits that are (as adjusted for inflation) only a tiny fraction of those upheld in *Buckley* are low enough to raise the question whether they were adopted to combat real or perceived corruption, or whether they were adopted out of the impermissible goal of reducing overall campaign spending. The record certainly supports this inference. *See* n. 12, *supra*. Nothing in the record suggests that the modest pre-existing limits were ineffective. The adoption of the limits on a per cycle basis raises the additional prospect that the limits were adopted by the legislature out of self-interest. Vermont's limits differ from those approved in *Buckley* not merely in degree: rather, Vermont's limits impose an entirely different kind of regulatory regime – one that will prevent many candidates from raising needed campaign funds. *Buckley*, 424 U.S. at 21.[24]

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[24] When adjusted for inflation, and for the critical fact that the limits apply on a two-year election cycle basis, rather than per election, the limits amount to approximately 3.0 percent of the *Buckley* limits for Vermont House races, 4.5 percent for Senate races, and 6.0 percent for gubernatorial elections. Adjusted for inflation since *Buckley* was decided, Vermont's per-election individual contribution limits respectively equate to $30.10, $45.15, and $60.20 in 1976 dollars. By contrast, under the law upheld in *Buckley*, candidates seeking a congressional House seat could raise $1,000 from each individual. (The deflation is calculated by using the "all items" Consumer Price Index

The threat of corruption cannot be used to justify Act 64's exceedingly low contribution limits. The State's evidence and the district court's findings are extremely thin, and miss the mark by failing to link the supposed problems with large contributions. While the State need not show money-for-vote chicanery, it must at least make a case arising from the broader interest in the "threat [of] politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. If the claims of widespread, improper influence are true, anecdotal evidence should be freely available. Disclosure of contributions has been required in Vermont for years, and these disclosures should offer documentary support for the claims, if accurate, of dependence on large contributions and the influence of those contributions. No such case was made here. The legislative findings and trial testimony relied upon by the State loudly bemoan the evils of "large" contributions and the public's suspicion of them, but very few examples were provided. The small number of examples given at trial of supposedly "suspicious" contributions for the most part involved contributions that were low enough to have been permitted even by these new limits. Despite having compiled extensive contribution data covering three election cycles, the State never identified the phantom contributors who are allegedly poisoning the system with large contributions – much less established a pattern or practice of corrosive large contributions.

The public has no objective basis to believe that Vermont's citizen legislators are acting contrary to the

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(CPI) for 1976 and 2004 as calculated by the Bureau of Labor Statistics, *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. The 1976 CPI was 56.9 and the same index for 2004 was 188.9. To convert 2004 dollars to 1976 dollars, one must multiply the 2004 dollar amount by the quotient of the CPIs, 56.9/188.9 = .301.) Since Vermont's restrictions apply equally to organizational giving, they are even more severe when measured against the higher PAC and party limits upheld in *Buckley*.

interests of the constituents they represent. If (as the state contends) the public has become cynical about the role of money in Vermont's political process, this attitude cannot be traced to large contributions made by so-called special interests. To the contrary, contributions by industry groups and other so-called special interests fall well within the modest limits that have been in effect for many years. The goal of driving down already modest contributions even further because of their source rather than their amount is not sufficient basis to meet *Buckley*'s definition of corruption.

B. Act 64's Limits Restrict Too Much Speech

In *Shrink*, the Court upheld a Missouri statute that imposed a $1,000 limit (which was to be adjusted for inflation) against the charge that inflation had eroded the value of $1,000 in the years since *Buckley* was decided. Although the Court rejected the argument that changes in the Consumer Price Index controlled its analysis, the Court reiterated what it said in *Buckley*, twenty-four years earlier, namely, that there are circumstances where campaign contribution limits can be so low as to violate First Amendment rights. *Shrink*, 528 U.S. at 396-97.

Justice Breyer amplifies the point that states must act with some restraint in setting contribution limits. Justices Breyer and Ginsberg left open the possibility that they would have found the $1,000 limits unconstitutional on a different record. Legislative deference, they explained, does not extend to whether a law,

> by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge. The statutory limit here, $1,075 (or 378, 1976 dollars), is low enough to raise such a question.

Shrink, 528 U.S. 404 (Breyer, J., concurring.)

The record in this case amply demonstrates that Act 64 would radically reduce the funding of political campaigns. By setting its limits so low and applying them so broadly, and by not indexing for inflation, Vermont makes it difficult for many candidates to raise necessary finances. By treating political parties and PACs as if they were individual contributors, moreover, the limits trample the weighty associational interests at stake when individuals who come together for a common purpose. Instead of reining in the "special interests" and industry groups that apparently cause the public concern, Act 64 takes aim at "clean" money from the very sources that pose little or no risk of corruption and of which the public is far less suspicious. Nowhere will the impact be harder felt than in those elections in which a candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour boost in a close election in which an additional mailing or media spot might be desired.

The Second Circuit ignored this evidence and instead relied on the district court findings that the reduced limits will not harm the "average" candidate. But an "average" candidate does not exist. Mathematical averages are skewed due to the inclusion of numerous incumbents who raised little money because they ran unopposed or faced nominal opposition, and challengers who did not raise the funds necessary to be competitive. Relying on average contributions from past elections as a relevant guide obscures the severe impact Act 64's limits impose upon candidates in competitive elections. These are the races in which candidates run hard-fought campaigns and a full debate of the issues is most critical. Relying on average contributions from past elections as a relevant guide is therefore flawed for the same reasons that it is inadequate to use average spending patterns as a guide for adopting expenditure limits.

Thus, while the limits may not affect all elections in all districts, Act 64's limits will seriously impact candidates in statewide races and many House and Senate elections. *See* pp. 12-14, *supra*. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. *See* p. 10 & n.5, *supra*. Act 64 will prevent candidates from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and undermine "the potential for robust and effective discussion of candidates and campaign issues," *id.* at 29. All of these consequences are fully spelled out in the trial record. *See* pp. 7-14, *supra*.

The new limits hobble candidate fundraising in two additional ways never endorsed by this Court. First, they inexplicably apply on a per-election cycle basis. Under the Federal Election Campaign Act and the laws in effect in every other state, contribution limits apply on a per-election basis, allowing individuals to contribute separately to the candidate's primary and general election funds. As with expenditure limits, Vermont's per-cycle scheme will severely handicap candidates who have exhausted their financial resources and pool of donors in a contested primary. The burden is exacerbated since Vermont primaries are held the second Tuesday of September, less than 60 days before the general election. The burden will fall most heavily on challengers since incumbents do not normally face a primary opponent. It is unreasonable to ask a successful primary candidate to finance a general election after having already solicited the maximum contribution from his or her supporters. A challenger in such a position faces an even tougher battle if her general election opponent faced no opposition in the primary.

Second, Act 64's limits apply equally to individuals, political parties and political committees, including House and Senate leadership committees. Political parties and party committees are critical sources of financing in competitive

elections, but for all practical purposes, these quintessential political organizations can no longer provide any substantial financial support for their candidates. Similarly, the registered political committees of advocacy groups such as the National Rifle Association and Planned Parenthood will no longer be able to use their resources to provide any meaningful financial support for the candidates they support. Historically, these groups are an important source of funds for candidates. They target candidates in competitive elections in an effort to alter or preserve government policies on issues that are important to them. Although the limits on contributions from political parties and PACs apply equally to incumbents and challengers alike, the burden will likely be felt the most by challengers.

The Court of Appeals uncritically accepted the district court's findings with respect to contributions made by individuals and PACs, but rejected the district court's conclusion that political parties must have greater latitude than allowed by Act 64. The district court held that "[s]uch limits would reduce the voice of political parties to an undesirable and constitutionally impermissible whisper." P.A. 177a. The Court of Appeals erroneously held that this argument was foreclosed by *Colorado II*. In that case, this Court held that the government has a sustainable interest in regulating party coordinated expenditures that corresponds to its interest in regulating party contributions generally. It is a strained, and ultimately incorrect, reading of that decision, however, to extend the Court's holding to the broader interest of regulating political parties as if they were individual contributors. By treating political parties as if they were a single individual contributor, Act 64 deprives candidates of necessary party support. Candidates cannot accept direct contributions above the applicable limits (in cash, in kind, or "related"), and parties are essentially prohibited from working with their candidates in any meaningful way.

The Act thus severely and unnecessarily restricts the associational interests that political parties and organizations embody. Political organizations amplify the voices of many small contributors. "It is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do . . . ." *Colorado II*, 533 U.S. at 453; *cf. Colorado I*, 518 U.S. at 637 (Thomas, J., concurring in judgment and dissenting in part) (stating that "[p]olitical associations allow citizens to pool their resources and make their advocacy more effective"). The political committees of organizations like the NRA fulfill the same role. These groups are comprised of many individuals who come together for the very purpose of influencing elections. There is nothing improper or invidious about this – it is the very stuff of democracy.

This Court has specifically noted that the potential for "proliferation of political funds" is an important factor mitigating the burdens that would otherwise be imposed by low contribution limits. *Buckley*, 424 U.S. at 28 n.31. The availability of sizable political party contributions is also an important factor that allows effective campaigning despite low contribution limits on other individuals and groups. Vermont's draconian limitations leave no source of sizable funds except from the personal funds of the candidate and his close relations – a source obviously not available to those who lack personal wealth. Significantly, the FECA limits upheld in *Buckley* drew a distinction between contributions made by individuals and those made by political organizations. *See* 2 U.S.C. § 441a (allowing larger PAC and party contributions, and additional party coordinated contributions). To enable candidates to amass the resources necessary for "effective advocacy," larger contributions by political organizations must be allowed. Binding parties and political committees to the same limits that apply to

individuals will inevitably reduce the resources available to candidates.

Even if the Court of Appeals' understanding of *Colorado II* is correct, and political parties do not warrant special consideration, the case should have been remanded, because the court failed to analyze the extent to which its holding as to political parties exacerbated the effect of the low individual limits.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully Submitted,

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Dated: December 14, 2005

Appendix

Copy of Senate Bill 16, 2005 Vermont Laws Public Act 62, which contains certain amendments to 17 V.S.A. §§ 2801 et. seq.
Available at www.leg.state.vt.us

NO. 62. AN ACT RELATING TO CAMPAIGN FINANCE.

(S.16)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 17 V.S.A. § 2801 is amended to read:

§ 2801. DEFINITIONS

As used in this chapter:

* * *

(4) "Political committee" or "political action committee" means any formal or informal committee of two or more individuals, or a corporation, labor organization, public interest group, or other entity, not including a political party, which receives contributions ~~or~~ of more than $500.00 and makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question, in any election or affecting the outcome of an election.

* * *

(9) "Two-year general election cycle" means the 24-month period that begins ~~the day~~ 38 days after a general election. Expenditures related to a previous campaign and contributions to retire a debt of a previous campaign shall be attributed to the earlier campaign cycle.

* * *

(11) "Telephone bank" means more than 500 telephone calls of an identical or substantially similar nature that are made to the general public within any 30-day period.

Sec. 2. 17 V.S.A. § 2801a is added to read:

§ 2801a. EXCEPTIONS

The definitions of "contribution", "expenditure" and "electioneering communication" shall not apply to any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication which has not been paid for, or such facilities are not owned or controlled, by any political party, committee or candidate.

Sec. 3. 17 V.S.A. § 2802 is amended to read:

§ 2802. CHECKING ACCOUNT; TREASURER

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by either a credit card, or a debit card, check or other electronic transfer from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account.

Sec. 4. 17 V.S.A. § 2803 is amended to read:

§ 2803. CAMPAIGN REPORTS; FORMS; FILING

* * *

(b) The form shall require the reporting of all contributions and expenditures accepted or spent during the reporting period and during the campaign to date and shall require full disclosure of the manner in which any indebtedness is discharged or forgiven. Contributions and expenditures for the reporting period and for the campaign to date also shall be totalled in an appropriate place on the form. The total of contributions shall include a subtotal of nonmonetary contributions and a subtotal of all monetary contributions. The form shall contain a list of the required filing times so that the person filing may designate for which time period the filing is made. Contributions and expenditures received or spent ~~during the 48 hour period~~ after 5 p.m. on the third day prior to the filing deadline shall be reported on the next report.

(c) The form described in this section shall contain language of certification of the truth of the statements and places for the signature of the candidate ~~and his treasurer~~ or the treasurer of the campaign.

(d) All reports filed under this section shall be retained in an indexed file by the official with whom the report is filed and shall be subject to the examination of any person.

(e) Disclosure shall be limited to the information required ~~by this section~~ to administer this chapter.

Sec. 5. 17 V.S.A. § 2804 is amended to read:

§ 2804. SURPLUS CAMPAIGN FUNDS

* * *

(c) Surplus funds in a political committee's or candidate's account after payment of all campaign debts may be contributed to other candidates, political parties, or political committees subject to the contribution limits set forth in this chapter or may be contributed to a charity.

(d) The "final report" of a candidate shall indicate the amount of the surplus and how it has been or is to be liquidated.

Sec. 6. 17 V.S.A. § 2805(d) and (e) are amended to read:

(d) A candidate shall not accept a monetary contribution in excess of $50.00 unless made by check, credit or debit card, or other electronic transfer.

(e) A candidate, political party, or political committee shall not knowingly accept a contribution which is not directly from the contributor, but was transferred to the contributor by another person for the purpose of transferring the same to the candidate, or otherwise circumventing the provisions of this chapter. It shall be a violation of this chapter for a person to make a contribution with the explicit or implicit understanding that the contribution will be transferred in violation of this subsection.

Sec. 7. 17 V.S.A. § 2805a(e) is added to read:

(e) The expenditure limitations contained in this section shall be adjusted for inflation by increasing them based on the Consumer Price Index. Increases shall be rounded up to the nearest $100.00. Increases shall be effective for the first campaign cycle beginning after the general election

held on November 2, 2004. The adjustments shall be calculated retroactively to January 1, 2001. On or before July 1, 2005, the secretary of state shall calculate and publish the amount of each limitation that will apply to the election cycle in which July 1, 2005 falls. On July 1 of each subsequent odd-numbered year the secretary shall publish the amount of each limitation for the election cycle in which that publication falls.

Sec. 8. 17 V.S.A. § 2806a is added to read:

§ 2806a. CIVIL INVESTIGATION

(a) The attorney general or a state's attorney, whenever he or she has reason to believe any person to be or to have been in violation of this chapter or of any rule or regulation made pursuant to this chapter, may examine or cause to be examined by any agent or representative designated by him or her for that purpose any books, records, papers, memoranda, and physical objects of any nature bearing upon each alleged violation and may demand written responses under oath to questions bearing upon each alleged violation. The attorney general or state's attorney may require the attendance of such person or of any other person having knowledge in the premises in the county where such person resides or has a place of business or in Washington County if such person is a nonresident or has no place of business within the state and may take testimony and require proof material for his or her information and may administer oaths or take acknowledgment in respect of any book, record, paper, or memorandum. The attorney general or a state's attorney shall serve notice of the time, place, and cause of such examination or attendance or notice of the cause of the demand for written responses personally or by certified

mail upon such person at his or her principal place of business, or, if such place is not known, to his or her last known address. Any book, record, paper, memorandum, or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of this state for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general or a state's attorney or another law enforcement officer engaged in legitimate law enforcement activities, unless with the consent of the person producing the same. This subsection shall not be applicable to any criminal investigation or prosecution brought under the laws of this or any state.

(b) A person upon whom a notice is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by the order of a court of this state. Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person subject to such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00.

(c) Whenever any person fails to comply with any notice served upon him or her under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general or a state's attorney may file, in the superior court in which such person resides or has his or her principal place of business or in Washington County if such person is a nonresident or has no principal place of business in this state, and serve

upon such person a petition for an order of such court for the enforcement of this section. Whenever any petition is filed under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section. Any disobedience of any order entered under this section by any court shall be punished as a contempt thereof.

(d) Any person aggrieved by a civil investigation conducted under this section may seek relief from Washington Superior Court or the superior court in the county in which the aggrieved person resides. Except for cases the court considers to be of greater importance, proceedings before superior court as authorized by this section shall take precedence on the docket over all other cases.

Sec. 9. 17 V.S.A. § 2807 is amended to read:

§ 2807. NEW CAMPAIGN ACCOUNTS

Candidates who choose to ~~open~~ roll over any surplus contributions into a new campaign account for public office may close out their former campaign by filing a final report with the secretary of state converting all debts and assets to the new campaign. ~~This final report shall disclose all contributions and expenditures and the disposition of all debts and assets attributable to the former campaign as of the date of the filing of the final report.~~ A candidate shall be required to file a new bank designation form only if there has been a change in the treasurer or the location of the campaign account.

Sec. 10. 17 V.S.A. § 2811 is amended to read:

§ 2811. CAMPAIGN REPORTS; CANDIDATES FOR STATE OFFICE, THE GENERAL ASSEMBLY, POLITICAL COMMITTEES, AND POLITICAL PARTIES

(a) Each candidate for state office, each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more, and each political committee and each political party required to register under section 2831 of this title shall file with the secretary of state campaign finance reports 40 days before the primary election and on the 25th of each month thereafter and continuing to the general election and 10 days after the general election.

* * *

(f) In addition to any other reports required to be filed under this chapter, a candidate for state office or for the general assembly who receives a monetary contribution in an amount over $2,000.00 within 10 days of a primary or general election shall report the contribution to the secretary of state within 24 hours of receiving the contribution. The report shall include all information that is required to be disclosed under the provisions of subsections 2803(a) and (b) of this title.

(g) Each candidate for state office and each candidate for the general assembly who has made expenditures or received contributions of $500.00 or less shall file with the secretary of state, 10 days following the general election, a statement that the candidate has not made expenditures or received contributions of more than $500.00 during the two-year general election cycle.

Sec. 11. 17 V.S.A. § 2831 is amended to read:

§ 2831. CAMPAIGN REPORTS; POLITICAL COMMITTEES AND PARTIES

* * *

(b) A political committee or political party which has accepted contributions or made expenditures of $500.00, or more, for the purpose of influencing a local election or supporting or opposing one or more candidates in a local election shall~~, in addition to other filings required by this chapter,~~ file campaign finance reports ten days before and ten days after the local election with the clerk of the municipality in which the election is held and with the secretary of state.

(c) Any formal or informal committee of two or more individuals, or a corporation, labor organization, public interest group, or other entity, not including a political party, which makes expenditures of more than $500.00 in any one calendar year for the purpose of advocating a position on a public question in any election or affecting the outcome of an election on a public question shall file a report of its expenditures 10 days before and 10 days after the election with the clerk of the municipality in which the election is held and with the secretary of state.

Sec. 12. 17 V.S.A. § 2853(a) is amended to read:

(a) A person shall not be eligible for Vermont campaign finance grants if, during a two-year general election cycle, he or she becomes a candidate by announcing that he or she seeks an elected position as governor or lieutenant governor, or by accepting contributions totaling ~~$500.00~~ $2,000.00 or more or by making expenditures totaling

~~$500.00~~ $2,000.00 or more, prior to February 15 of the general election year.

Sec. 13. 17 V.S.A. chapter 59, subchapter 8 is added to read:

Subchapter 8. Electioneering Communications

§ 2891. DEFINITIONS

As used in this chapter, "electioneering communication" means any communication, including communications published in any newspaper or periodical or broadcast on radio or television or over any public address system, placed on any billboards, outdoor facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars, or in any direct mailing, robotic phone calls, or mass e-mails that refers to a clearly identified candidate for office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate.

§ 2892. IDENTIFICATION

All electioneering communications shall contain the name and address of the person, political committee, or campaign who or which paid for the communication. The communication shall clearly designate the name of the candidate, party, or political committee by or on whose behalf the same is published or broadcast. The identification requirements of this section shall not apply to lapel stickers or buttons, nor shall they apply to electioneering communications made by a single individual acting alone who spends, in a single two-year general

election cycle, a cumulative amount of no more than $150.00 on those electioneering communications.

§ 2893. NOTICE OF EXPENDITURE

(a) For purposes of this section, "mass media activities" includes television commercials, radio commercials, mass mailings, literature drops, newspaper and periodical advertisements, robotic phone calls, and telephone banks which include the name or likeness of a clearly identified candidate for office.

(b) In addition to any other reports required to be filed under this chapter, a person who makes expenditures for any one mass media activity totaling $500.00 or more within 30 days of a primary or general election shall, for each activity, file a mass media report with the secretary of state and send a copy of the mass media report to each candidate whose name or likeness is included in the activity within 24 hours of the expenditure or activity, whichever occurs first. For the purposes of this section, a person shall be treated as having made an expenditure if the person has executed a contract to make the expenditure. The report shall identify the person who made the expenditure with the name of the candidate involved in the activity and any other information relating to the expenditure that is required to be disclosed under the provisions of subsections 2803(a) and (b) of this title.

Sec. 14. REPEAL

17 V.S.A. § 2808 (preparation of list of accumulated campaign expenditures by secretary of state) and 17 V.S.A. chapter 59, subchapter 7 §§ 2881-2883 (political advertisements) are repealed.

Approved: June 15, 2005

No. 04-1530
(consolidated with 04-1528, 04-1697)

In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM SORRELL, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief for Petitioners Vermont Republican State Committee, et al.

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December 14, 2005

Questions Presented

1. Whether Vermont's mandatory candidate expenditure limits violate the freedom of political speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's $200-$400 limits per election cycle on campaign contributions to state candidates violate the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution because they are unconstitutionally low.

3. Whether Vermont's presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceeding

The following individuals and entities are parties to the proceeding in the court below:

Petitioners are Plaintiffs Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee –Fund for Independent Political Expenditures, Marcella Landell, and Donald R. Brunelle.

Consolidated Petitioners in 04-1528 are Plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch and Vermont Libertarian Party.

Respondents are Defendants William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand and Deborah Markowitz.

Consolidated Petitioners in 04-1697 and Respondents are Defendant-Intervenors Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson.

Corporate Disclosure Statement

In accord with Supreme Court Rule 29.6, Petitioners state that the Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, and Vermont Right to Life Committee–Fund for Independent Political Expenditures are not corporations, but are associations.

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Opinions Below

The decision of the court of appeals is reported at 382 F.3d 91 (2d Cir. 2004). The opinion of the district court is reported at 118 F. Supp. 2d 459 (D. Vt. 2000).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Plaintiffs' Petition for Rehearing en banc was denied on February 11, 2005, which is reported at 406 F.3d 159 (2d Cir. 2005). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The First and Fourteenth Amendments to the United States Constitution are printed in the *Petition for a Writ of Certiorari* at 1. 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64") is printed in the Appendix to the Petition ("P.A.") at 1a-20a.

Statement of the Case

Petitioners adopt the Statement of the Case in the Brief of Petitioners Neil Randall, et al.

Summary of the Argument

The First Amendment[1] protects the four "indispensable democratic freedoms," *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945), of which political expression is "at the core." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). The "major purpose of that amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Act 64, however, was enacted

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[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for the redress of grievances." U.S. Const. amend. I.

for the opposite purpose, to force a reduction in overall campaign spending. This purpose is accomplished through the lowest candidate contribution limits in the country, through mandatory candidate expenditure limits, and through treating independent expenditures as related expenditures of candidates subject to these limits. This effort is in flagrant disregard of the First Amendment and is unconstitutional.

Argument

I. Act 64's Entire Scheme Was Enacted with the Specific Intent to Unconstitutionally Force a Reduction in Overall Campaign Spending in Flagrant Disregard of the First Amendment.

A. Vermont enacted both "laughably low" contribution and expenditure limits with the specific intent to force a reduction in overall candidate campaign spending.

Act 64 contains such "laughably low" contribution, P.A. 331a (Walker, C.J., dissenting), and expenditure limits, P.A. at 343a-44a (Cabranes, J. dissenting), "that they cannot but impede meaningful debate of public issues." *Id.* Of course, this was the purpose, as well as the effect, of Act 64's provisions.

Act 64's candidate contribution and expenditure limits were specifically enacted for the impermissible purpose of reducing overall campaign spending. The original version of the bill did not include mandatory spending limits, but did include low contribution limits, Ex. I, E-0001-25, and was lauded by Gov. Howard Dean as a plan which "limits the amount of money candidates can spend in both primary and general elections." Ex. III, E-0903. Similarly, the bill's sponsor, Rep. Karen Kitzmiller, testified in the committee hearings, before the mandatory spending limits were inserted in the bill, that the bill had

two principal goals: (1) "to reduce and control expenditures on election campaigns" and (2) to provide public funding. Ex. VIII, E-2839, E-2894. The legislative counsel also described a principal goal of this bill as "to reduce and control the expenditures on election campaigns," through low contribution limits. Ex. VIII, E-2813. Once the bill had been amended to include mandatory spending limits, the legislative counsel reiterated that "[t]he bill as amended would control campaign expenditures by establishing mandatory campaign expenditure limits applicable to all candidates .... The bill would also limit campaign expenditures by limiting the amounts . . . of contributions made to candidates." Ex. VIII, E-2821.

The legislative findings emphasize that "[e]lection campaigns for statewide and state legislative office are becoming too expensive," Finding (1), P.A. 101a, that "expensively long and expensive campaigns" are undesirable, Finding (10), *Id.* at 103a, and that "campaign expenditures must be reduced for incumbents."[2] Finding (15), *Id.* at 104a. In contrast, the terms "corruption" or "improper influence" are conspicuously absent from the legislative findings enacted with Act 64. *Id.* at 101a-04a.

The desire to force a reduction in overall candidate campaign spending was motivated in part by nostalgia for a bygone era when campaigns in Vermont were perceived to be less sophisticated and were thought to

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[2]Act 64 replaced a $1,000 per election candidate contribution limit from individuals and PACs in effect since 1971. Political party contributions to candidates were unlimited. Furthermore, from 1993 to 1998, candidates could voluntarily agree to limit campaign expenditures to amounts that were in place pre-*Buckley*. Former 17 V.S.A. §§ 2841-2842. Participation in this voluntary program went from 85% to 90% in the first year to zero percent of statewide elections in 1998. P.A. 28a. Apparently, these limits did not stem campaign finance spending which the legislature wanted to accomplish with Act 64.

rely on personal contact, not mass media advertizing. Ex. III, E-902; Tr. V-147. With drastically reduced overall campaign spending enforced by Act 64, Vermont argued below that modern, more costly means of communicating with the electorate could be replaced by candidates personally delivering their campaign messages door-to-door (Def.'s Br. 44-46 (2d Cir.)). While some candidates prefer grass roots campaigning, Tr. V-127, 129, 138, 141-43, forego more expensive campaigns due to lack of resources, Tr. II-13, or find it adequate to get themselves elected in non-competitive races, many candidates find it necessary to utilize mass media communications. Tr. IV-163, 172; Ex. VIII, E-3052. Act 64's contribution and expenditure limits, however, attempt to impose one method of campaigning by severely limiting the resources needed for others.

B. Forcing a reduction in candidate campaign spending is an impermissible legislative purpose.

The forced reduction in overall candidate campaign spending is illegitimate under the First Amendment. As this Court stated in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S.1, 57 (1976). Thus, campaign expenditure limits were invalidated in *Buckley*, because they were enacted to combat "wasteful campaign spending." *FEC v. Colorado Republican Fed. Campaign*

Comm., 533 U.S. 431, 457 (2001) (*"Colorado II"*).

Furthermore, legislating for the impermissible purpose of the "suppression of ideas" is unconstitutional, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 n.3 (2000) (*"Shrink"*); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 540 (1987), and was fatal to the limits at issue in *Colorado I*:

> This Court's opinions suggest that Congress wrote the . . . [p]rovision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending.

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618 (1996) (citations omitted) (*"Colorado I"*).

The evidence here demonstrates that the candidate contribution and expenditure limits were drafted for the purpose of reducing overall campaign expenditures, an interest which this Court has explicitly rejected.[8] It should not be surprising that the provisions would have that very effect.

C. Restrictions on candidate speech have a substantial negative effect on our democracy.

Candidate speech, the target of Act 64's contribution and expenditure limits is entitled to the highest protection under the First Amendment. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (applying strict scrutiny to legislation limiting judicial

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[8] "[T]he proponents of Act 64 never doubted its unconstitutionality under *Buckley* and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*." P.A. 194a-95a (Winter, J., dissenting), 201a-02a, 258a-59a; P.A. 340a (Jacobs, J., dissenting); *see also* Ex. VIII, E-2821.

candidate speech). The public must be able to make "informed choices" regarding candidates because those individuals will "shape the course that we follow as a nation," *Buckley*, 424 U.S. at 14-15, and the public is best able to make such choices when they hear *from the candidates themselves* regarding their qualifications and positions on issues.

> [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that *they* be allowed freely to express *themselves* on matters of current public importance. [As a result,] [w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

White, 536 U.S. at 781-82 (citations and internal quotation marks omitted) (emphasis added); *see also id.* at 805-06 (Ginsburg, J., dissenting). So "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of the money spent is from his own funds or is raised through legal contributions. *Buckley*, 424 U.S. at 54. Candidates cannot be required to be bit players in their own elections.

D. This Court should not defer to incumbent legislators that pass laws, such as Act 64, affecting their own electoral fate.

The Second Circuit afforded substantial deference to the "predictive judgments" of the Vermont legislature regarding its "effect . . . on candidate behavior." P.A. 143a

n.17.[4] However, "[p]rotecting speech requires that courts be skeptical and assume the worst – not as a matter of fact, but as a matter of prudence and policy." P.A. 337a (Jacobs, J., dissenting). Strict scrutiny requires this "cold eye." *Id.* at 338a; *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-49 (2001).

This is especially true here where "the dominant but impermissible effect of the Act is to protect incumbents," P.A. 336a (Jacobs, J., dissenting),[5] where the "theory and factual assumptions proffered by the law's supporters [are accepted] at face value even when their actions belie their words," P.A. 207a (Winter, J., dissenting), when the law was expressly adopted for the illegitimate purpose of forcing a reduction in overall campaign spending, and when the State insists that their legislators are so corrupt that they will "sell privileged access," P.A. 101a, for "laughably low" contributions and "so crave reelection that they ignore official duties and personal honor to that end." P.A. 249a (Winter, J. dissenting), 206a.

II. Vermont's Contribution Limits Are Too Low To Be Closely Drawn to Further a Sufficiently Important Interest.

While contribution limits "impinge on the protected

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[4]The Second Circuit cited *McConnell v. FEC*, 540 U.S. 93, 165-66 (2003), for deferring to the predictive judgment of Congress that if state parties were not limited in their use of soft money in federal elections they would be used to circumvent the soft money ban on national parties. This prediction of circumvention has no relevance here. There are no options for candidate speech beyond that permitted by the funds raised under the contribution limits and allowed to be spent under the expenditure limits.

[5]Deference to legislative judgments should be afforded if "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

freedoms of expression and association," *McConnell*, 540 U.S. at 231, they may be upheld if "there is a 'sufficiently important interest,'" and if the limits are "'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25).

A. Vermont's contribution limits are not closely drawn because they are not limited to only large contributions that pose the danger of real or apparent corruption.

The corruption interest arises from "the perception of undue influence of *large* contributors to a candidate," *Shrink*, 528 U.S. at 393 (emphasis added), because of a "threat from politicians too compliant with the wishes of *large* contributors." *Id.* at 389 (emphasis added). Thus, this Court's corruption interest has two elements: (1) that the contribution be large enough to give rise to a legitimate suspicion of corruption, and (2) that there is a bona fide "suspicion that [the] large contributions are corrupt." *Id.* at 389-95.

1. Vermont's contribution limits are not limited to banning only large contributions that pose the danger of real or apparent corruption.

Buckley "reiterated this [large contribution] interest at least seven times," *Carver*, 72 F.3d 633, 638 (8th Cir. 1995) (citing *Buckley*, 424 U.S. at 25-28); *see also Buckley*, 424 U.S. at 45-46, 55, 67, and this Court upheld a $2,150 per election cycle limit in *Shrink* based on evidence of *large* contributions. 528 U.S. at 390-91.

The District Court attempted to meet this "large contribution" requirement by disengaging "large" from "the perception of undue influence." While the court characterized the contribution limits as approximating amounts "considered suspiciously large by the Vermont public," P.A. 59a, none of the seven witnesses the District

Court cited referred to them in this way. In fact, none of these witnesses testified that these contribution amounts would lead to public perception of corruption. The witnesses only referred to the relative size of the amounts, compared to most contributions, as "significant," "good-sized," and "large." A "significant" contribution is not the same as a "suspiciously large" contribution, or one that is large enough to give rise to a "perception of undue influence." Ex. VII, E-2641, 2673; Tr. VII-19; Tr. III-23-26.

2. Vermont has failed to prove that real or apparent corruption is closely related to its low contribution limits.

a. Vermont's conception of "corruption" goes well beyond this Court's.

The "hallmark of corruption" is a "financial *quid pro quo*: dollars for political favors," where "elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). However, there is no evidence of such corruption in this case, and the State's witnesses emphasized that they were "not talking about selling votes . . . . [but] about gaining access," Tr. VII-105-06, such as "through the fundraising system," P.A. 101a, or because "officials are more likely to return donors' phone calls." *Id.* at 140a. This evidence, however, was related to contributions of a thousand dollars or more, far above Act 64's new limits. Tr. VII-50 ($1,000); Tr. IX-167-69 ($1,000 to $2,000).[6] Indeed, the only finding by the Vermont

[6]In fact, Plaintiffs' evidence demonstrated that, of those members of the public that thought that persons making large contribution were "trying to buy special favors," 53% picked $20,000 or more, 17% picked a contribution from $1,000 to $5,000, and only 2% said "any amount." Ex. VIII, E-2742.

legislature that even remotely related to "corruption" was that Vermont politicians would "give access to contributors who make large contributions in preference to those who make small or no contributions," Finding (2), P.A. 102a, and the court below believed that this was sufficient. *Id.* at 94a.

It is true that this Court has found that the interest in corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U. S. at 150 (citation and internal quotation marks omitted). It was, however, "the manner in which parties *sold* access to federal candidates and officeholders," in *McConnell*, "that has given rise to the appearance of undue influence." *Id.* at 153. In *McConnell*, a systematic scheme of the national party committee "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150. But here there is no evidence of pre-access demands for contributions conditioned on granting access, only evidence post-contribution of "officials . . . more likely to return donors' phone calls." P.A. 140a.

This minimal evidence was countered by considerable evidence that even gaining access to legislators by large campaign contributions is not reasonably perceived in Vermont politics. Several witnesses with extensive experience in Vermont government testified that they were not aware of any Vermont politician ever providing preferential access for campaign contributions. For example, Steve Howard testified that in his six years of service in the Vermont House of Representatives and as chairman of the State Democratic Committee he was never aware of any situations in which contributions have purchased access to Vermont legislators. Tr. IV-180.

Moreover, there is considerable evidence in this record

that politicians in Vermont are readily accessible to all constituents. "Legislators [in Vermont] are accessible [] even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81. Legislators in Vermont will typically see anyone that wants to see them. Tr. VII-28. The record shows that Vermont officials are readily and easily accessible to *all* constituents.

b. Given the implausibility that $200-$400 contributions pose a danger of corruption, convincing evidence of corruption is necessary.

Although contribution limits can be upheld based upon their value in preventing corruption, this justification is not automatic. Even though the interest is "important in the abstract," this does not necessarily mean that the contribution limits "will in fact advance those interests." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part) ("[A]pplication of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue."). Thus, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. "*Buckley* demonstrates that the dangers of *large*, corrupt contributions and the suspicion that *large* contributions are corrupt are neither novel nor implausible." *Id.* (emphasis added). The limit upheld in *Shrink*, however, was $2,150 per election cycle, which is much larger than Vermont's $200 to $400 per election cycle limits. A

stronger evidentiary showing of the government's interest is required here, because Vermont's limits are so low as to render the anti-corruption interest implausible.[7]

Furthermore, these new low contribution limits replaced Vermont's $2,000 per cycle contribution limit. There is no evidence that the prior limit was insufficient to accomplish its permissible purpose. This is fatal to the constitutionality of the new limits. *See, e.g. Carver*, 72 F.2d at 643 (striking down new low contribution limits due to a lack of "any evidence of a harm or disease that needed to be addressed" between the old and new limits).

3. There is insufficient evidence of corruption in this case.

In upholding the limits in *Shrink*, this Court relied upon evidence that contributions in Missouri actually appeared to corrupt politicians.[8] In contrast to the

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[7] For example, this Court has held that a zero contribution limit on minors was unconstitutional, because "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny." *McConnell*, 540 U.S. at 232.

[8] The record evidence in *Shrink*, and the related case of *Carver*, included serious reports of alleged corruption. One reported incident was the decision of the state treasurer to use a bank for state business after that bank contributed $20,000 to the treasurer's campaign. *Shrink*, 528 U.S. at 393. Another article reported a state auditor candidate's receipt of a $40,000 contribution from a brewery and a $20,000 contribution from a bank. *Id.* The Eighth Circuit in *Carver* cited a $420,000 contribution to Missouri candidates from a political action committee linked to an investment bank. *Id.* at 393-94. In addition, there were reports of three scandals, including one in which a state legislator was accused of sponsoring legislation in exchange for kickbacks and another report of Missouri's former attorney general pleading guilty to conspiracy charges for misusing state property after being indicted for using a workers' compensation fund to profit campaign contributors. *Id.* at 394. In spite of these seemingly serious problems in Missouri, this Court cautioned that "there might, of course, be need for a more extensive evidentiary

evidence in *Shrink*, what is most significant about the State's evidence here is that it is "largely sparse, anecdotal, and conclusory," P.A. 266a (Winter, J., dissenting), contains "gross hyperbole . . . with precisely the same scripted sound-bites that are used in every talk-show discussion of the issues," *Id.* at 268a, and presents an absurdly contradictory "portrait of Vermont politics." *Id.* at 266a-67a. Despite a ten-day trial and testimony from the chief drafters and promoters of this legislation, veteran legislators, and campaign managers, the State failed to uncover a single incident of real or apparent corruption. Defense witnesses conceded that they could not point to any such incident in their own extensive experience in politics. Peter Smith, a former Vermont officeholder, testified that he was not aware of any instance in Vermont in which there was trading of votes in exchange for contributions. Tr. VIII-79. Karen Kitzmiller, a state representative, complained that "two particular groups, the tobacco industry and the pharmaceutical industry . . . freely give contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). *See also* Tr. V-115; Ex. IV, E-1362-64.

The District Court's decision was also based upon evidence of dubious relevance and little magnitude. Most of it pertained to a supposed erosion of public confidence. P.A. 56a. However, such a showing of a general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates." *NCPAC*, 470 U.S. at 499; Tr. VIII-134-38. The State has failed to bring forth convincing evidence of real or

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documentation if petitioners had made *any* showing of their own to cast doubt on the apparent implications of . . . the record." *Id.* (emphasis added).

apparent corruption, especially in light of the extremely low level of the limits and in light of the considerable evidence weighing against the legitimacy of the interest.

III. Because Vermont's Contribution Limits Are So Low That They Prevent Candidates from Mounting Effective Campaigns, They Are Unconstitutional.

A. Contribution limits that have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy are unconstitutional.

"Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'prevent[] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21); *Shrink*, 528 U.S. at 395-96 (same). Thus, "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981), which would make the limits a "difference[] in kind," not just a "[d]istinction[] in degree." *Buckley*, 424 U.S. at 30. Such a "system of suppressed political advocacy . . . would be unconstitutional under *Buckley*," *Shrink*, 528 U.S. at 396.[9]

B. Vermont's contribution limits have a severe impact on political dialogue by preventing candidates from amassing the resources necessary for effective advocacy.

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[9]For analogous situations, *compare Rosario v. Rockefeller*, 410 U.S. 752 (1973) *with Kusper v. Pontikes*, 414 U.S. 51 (1973); *also compare Hill v. Colorado*, 530 U.S. 703 (2000) *with Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

The Second Circuit failed to undertake a careful review of the consequences of the contribution limits and instead deferred to the flawed findings of the District Court, which found that the limits did not have a severe impact on political dialogue, primarily because: 1) over the three election cycles prior to trial, less than 10% of individual contributions exceeded the limits, and 2) the limits were high enough to permit effective campaigning in a mayoral election conducted under the limits. P.A. 170a. These findings do not justify contribution limits as extraordinarily low as Vermont's.

1. The evidence demonstrates that Vermont's contribution limits have a severe impact on political dialogue.

First, the District Court found that "[e]xpert testimony revealed that over the last three election cycles the percentage of all candidates' contributions received over the contribution limits was less than 10%." P.A. 57a. However, the District Court used the wrong analysis. Since this Court's concern is whether the limits could have a "severe impact on political dialogue," *Buckley*, 424 U.S. at 21, the focus must not be on how many individual contributions were over the limit, but rather the total amount of campaign *funds* that candidates would lose.

The evidence in *Shrink* failed to show any impact on the total amount of funds available to campaigns beyond the dubious and singular example of one candidate, who could identify only one contributor who would have given him more than the limit. This evidence failed, since "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Shrink*, 528 U.S. at 396.

In contrast to *Shrink*, the State's expert confirmed that Vermont campaigns would lose significant funds, over

28% in 1998 for all state senate campaigns and over 22% in all state house campaigns.[10] Ex. III, E-976-78. The impact on statewide candidates since 1994 showed several candidates losing more than 50% of their funding, with impacts of 30% or more being quite common. Ex. III, E-970-74.

Such statistics dwarf the 5.1% of funds affected by the contribution limits in *Buckley*, which provided the basis for the Court's finding that "[t]here is no indication . . . that the contribution limitations . . . would have any dramatic[ally] adverse effect on the funding of campaigns and political associations." 424 U.S. at 21.

The State's expert analyzed the effect on all campaigns when the focus should be on competitive elections. P.A. 236a-40a (Winter, J., dissenting); Tr. II-73, IV-17, VIII-150-51, X-154. There are many races where campaigns are irrelevant to the outcome, such as where candidates run unopposed, against only token opposition, or in a district that overwhelmingly favors one party. Tr. III-37. Further, minor party candidates rarely run to win but only to show the flag. Tr. II-22, 39. Because of these factors, over 1/3 of victorious house candidates in 1998 spent less than $500.00 in their campaigns, Ex. III, E-0945, and many more won with little candidate spending.

A better model for evaluating the effect of campaign finance limits is to examine the fraction of races that are truly competitive. Tr. II-73. In competitive races, an effective campaign can contribute to the outcome, and often determine which party controls legislative assemblies. Tr. VIII-139-40; Ex. VIII, E-2748. Thus, candidates

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[10]These percentages are actually significant understatements of funds lost due to the expert's assumption that all non-filing candidates each raised $500, and that none of those candidates received contributions over the applicable $200 or $300 limit. Ex. III, E-946-47. Neither assumption is correct.

are motivated to reach as many voters as possible through a variety of methods, including door-to-door distribution of literature, campaign events, direct mail, and advertising in newspapers, on radio and television, and through bill boards and yard signs. Ex. VIII, E-2760, E-2766, E-2772-77. E-2789, E-3052, E-3056-60. Since competitive races are where effective campaigns are most often conducted and can have an impact, the relevant measure of contribution limits is their effect on competitive races. Tr. X-154, IV-17.

The Plaintiffs' expert found that 20% of both senate and house campaigns in 1998 would have experienced a loss of over 30% of their contribution funds. Ex. VII, E-2351. Furthermore, in analyzing the most competitive elections, those targeted by the Vermont Republican Party, the Plaintiff's expert found that in 15 of the 17 1998 house races, the Republican candidates would have lost between $550 and $3,761 in raw dollars and between 8.7% and 54.8% in total funds as a result of the contribution limit. Ex. VII, E-2360-75. Similarly, the 14 targeted senate candidates would have lost from $3,150 to $6,900 in raw dollars and 13% to 43.7% of their total funds. Ex. VII, E-2354-59. When the "single source" rule is applied to Republican Party contributions, the candidates would have lost more funds. Ex. VII, E-2602. These candidates would have been forced to forego substantial communications as a result. Tr. II-81-95.

2. The evidence establishes that the contribution limits prevent candidates from amassing the resources necessary for effective campaigns.

Second, the District Court found that because the Burlington mayoral election, conducted after imposition of the contribution limits, "involved effective campaigns despite the contribution limitations," and because "the mayoral candidates raised funds comparable to the

amounts spent in state senate races in the past," P.A. 171a, the limits were high enough to permit effective campaigning.

The evidence demonstrates, however, that the $200 contribution limit in the mayoral race prevented challenger Kurt Wright from mounting an effective campaign. He "worked very hard" and "did well to raise" the $19,158 that he ultimately received, Ex. VIII, E-3053-54 (Wright deposition), Ex. VIII, E-2789, but this was $8,000-$10,000 less than it would have been. Ex. VIII, E-3052-54. This loss of funds forced the cancellation of a crucial direct mail effort and reduced his communication by other methods such as radio, television, and through volunteers coordinated by paid staff. Ex. VIII, E-3052.

The District Court also relied on a superficial description of the overall spending in the mayor's race compared with that of Chittenden County Senate races. The District Court compared the two competitive mayoral candidates with the *average* spending in six senate races, which included many candidates whose election was either a foregone conclusion or an impossibility. P.A. 58a-59a. In fact, in the 1996 and 1998 Chittenden Senate races, there were five challengers – including Wright himself – who spent more than Wright did in his mayoral race. Ex. IV, E-1305-06. In summary, the District Court's findings not withstanding, the evidence demonstrates that the contribution limits have a severe impact on political dialogue.

To determine whether the limits prevented candidates from mounting effective campaigns, the Second Circuit erroneously looked to whether the limits are "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." P.A. 153a, 157a. This language, borrowed from *Shrink*, 528 U.S. at 397, is not the constitutional standard; instead, the standard looks to a candi-

date's "power to mount a campaign with all the dollars likely to be forthcoming." *Id.* When low contribution limits act as expenditure limits, candidates still must have sufficient funds to mount effective campaigns. Read otherwise, this would represent a complete abandonment of the First Amendment mandate that citizens "retain control over the quantity and range of debate on public issues in a political campaign," and that the government may not limit certain spending because it deems it "wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57.

The amount of money needed to mount an effective campaign[11] varies widely.[12] Some candidates are well known; others have a substantial advantage due to their party affiliation. Some districts comprise a single town with a single media market while others have several towns or large rural areas with multiple media markets. Still others are located in metropolitan areas where media ads are especially expensive because they cover more than the district. Tr. II-74-95.

Another key factor is the well established principle of diminishing marginal returns. After an initial surge of

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[11]Generally, a candidate is able to mount an effective campaign when she is able to effectively communicate to at least 75-80% of potential voters the candidate's name, something about the candidate as a person, the candidate's positions on key issues, and some contrast of the candidate's positions with her opponent's. Tr. I-95-97; Tr. IV-80; Tr. II-71. This requires communicating a minimum of 4 to 5 messages at least 4 to 5 times to each potential voter, Tr. I-98-100; Tr. II-72. The candidate must also have sufficient funds to respond to an opponent. Tr. II-126. Many candidates do not run effective campaigns. Tr. I-95-96.

[12]For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house and $30,000 to $50,000 in the senate, Tr. IV-169, 171; an effective statewide gubernatorial race costs between $600,000 and $800,000. Tr. IV-81; Tr. I-39-40; Tr. IV-27-28.

very effective spending, each successive communication dollar is likely to reach and motivate fewer voters. Conversely, each successive voter will cost more to reach than the one before. Tr. III-163-64. Reaching such additional voters is critical in the most competitive races. For this reason, mounting an effective campaign in a competitive race costs far more than less competitive ones.[13]

The record is replete with evidence that the contribution limits are too low to permit effective campaigning. George McNeill, a political consultant for hundreds of Vermont races, testified that many 1998 Vermont state senate and house candidates would not have been able to run effective campaigns under the limits. Tr. II-73-101. Ninety percent of house races targeted by the Republican Party in 1998 and seventy-nine percent of targeted 1998 senate races would have been unable to run effective campaigns. Tr. II-74-92, 99-102.[14] The money lost could

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[13]In addition, because of the low contribution limits, candidates will face increased competition from independent expenditures, which could drown out or at least dilute the candidate's own message. In fact, the "tight contribution limits" have caused an "unprecedented amount" of independent expenditures in the 2000 election. P.A. 241a (Winter, J. dissenting).

[14]For instance, Gerald Morrissey would have lost one-quarter of his contributions revenue under the contribution limits, and could not have effectively campaigned for state senate against an "entrenched senator." Tr. II-76. Neither could Dennis Delaney, because Chittenden County is Vermont's largest county with much higher expenses. Tr. II-80-81. Ruth Harvie could not have effectively campaigned because advertising for mass media in her state senate district is expensive since there are a lot of "small, individual newspapers." Tr. II-84-85. Joseph Tully, a "relative newcomer," would have been unable to "get the name recognition and the issue recognition that he was able to get" before the limits. Tr. II-87-88. Patricia Welch, who had "been out of the political scene for five to six years," would not have acquired the necessary name recognition. Tr. II-89. Harvey Smith could not have effectively campaigned, because, in his

not have been regained by additional fundraising. Tr. II-74-92, 99-102.[15]

William Meub, who had run for governor, testified that the contribution limit would have prohibited him from amassing the resources he needed to mount an effective campaign and would have drained his time, making it even more difficult to campaign. "What you have done [by imposing the $400 limit] is you have required an increased amount of time at fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning . . . ." Tr. IV-36.

The extensive record in this case firmly establishes that Vermont's exceedingly low contribution limits create a "system of suppressed political advocacy," just as the legislature intended. Because candidates cannot mount effective campaigns under the limits, Vermont's contribution limits are unconstitutional.

IV. Vermont's Contribution Limits Are Unconstitutionally Low Because They Insulate Legislators from Challenge.

Contribution limits can be so low that they "significantly increase[] the . . . advantages of incumbency and thereby insulate[] legislators from effective electoral

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district, he would have to advertise in more than one newspaper and on two or three radio stations. Tr. II-91. If $2000 had been removed from David Brown's campaign funds, he would have had to reduce advertising, "whether in the newspapers, TV or lawn signs . . . [or] walking banners," and "you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." Tr. II-92.

[15]Act 64's contribution limits also have a chilling effect on individuals deciding whether to run for office. McNeill testified that prospective candidates, after having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." Tr. II-65.

challenge." *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). This concern acknowledges that challengers face the harshest impact of contribution limits.

"[A]n incumbent usually begins the race with significant advantages." *Buckley*, 424 U.S. at 31 n.33. Most incumbents begin their campaigns with strong name recognition and widespread public knowledge of their qualifications and positions. Ex. IV, E-1395-99. Challengers spend more to get their message out, Tr. IV-172-73; Ex. VII, E-2703-05, because they are usually relative unknowns. Tr. II-184. Challengers also suffer because they generally have less developed contributor lists and contact networks than incumbents, so they tend to have more difficulty raising funds than incumbents, Ex. VIII, E-3076; Tr. I-94-95, and must rely upon a smaller group of larger contributors, especially for the "seed money" they need to get their campaigns started. Tr. IV-40.

Justice Breyer emphasized, in *Shrink*, that, "[t]he statutory limit here, $1,075 [per election], is low enough to raise such a question." *Shrink*, 528 U.S. at 404 (Breyer, J. concurring). Thus, Missouri's contribution limits, even though upheld, were constitutionally suspect, even though they allowed per-cycle contributions of more than five times that allowed by Vermont's highest limit.[16] If limiting Missouri candidates to $2,150 per election cycle raises disturbing questions, Vermont's limits of $200-$400 per cycle must be considered unconstitutional.

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[16]Act 64's choice of a two-year cycle combines primary and general elections under the limits and "does not reduce the influence or access to officeholders of special interests, reduce time pressures on candidates, or increase citizen or voter confidence in government." P.A. 256a (Winter, J. dissenting). The two-year time period, however, "will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle." *Id.* at 248a.

The data compiled by both the State's and Plaintiffs' experts show that Vermont's limits will impose a greater burden upon most challengers. In Vermont, challengers routinely have outspent incumbents because they are more dependent upon spending for developing their reputations with the voters. Ex. VII, E-2352; Ex. III, E-987-92. Moreover, challengers rely on larger contributions than have incumbents, so that challengers in both the house and senate in 1998 would have lost a larger share of their funds than incumbents.

According to the State's expert Anthony Gierzynski, these limits would have banned 36% of the funds raised in 1998 senate races by all non-incumbents compared with 20.2% of the funds raised by all incumbents. Ex. III, E-0976. Similarly, in 1998 house races, the limits would have prohibited 24.6% of all non-incumbent funds compared with 19.7% of all incumbent funds. Ex. III, E-0978. Seventy-five house challengers (out of 150 seats) would have lost $44,680, while the 67 incumbents would have lost only $15,493. Ex. VII, E-2360. This understates the full extent of the problem because the data examined all candidates, not just the candidates in competitive races. Furthermore, this disparate impact on challengers is compounded because challenger spending is more effective than incumbent spending on a dollar for dollar basis. Tr. X-81; *see also* Tr. III-163.

Non-incumbent candidates, therefore, "are at an incredible disadvantage under the . . . statute[]." Tr. IV-172.[17] Thus, Act 64 is an effective means to protect incumbents.

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[17]This is especially true for nontraditional candidates, such as "a woman, an openly gay candidate, an African American candidate." Tr. IV-174. As an openly gay candidate himself, Steve Howard had the "added burden" of proving himself to voters. Tr. IV-175.

V. The Limits on Contributions to Candidates from Political Parties Are Too Low to Pass Heightened Scrutiny.

The District Court correctly recognized that even though limits on contributions from parties to candidates are permissible in order to "deter avoidance of the individual contribution limits," Vermont's contribution limits for political parties to candidates are too low. P.A. 72a-76a. The court explained that limits on party contributions "cannot be so radical in effect as to render political association between parties and candidates ineffective." *Id.* at 75a. The court found that the low limits "would reduce the voice of political parties to an undesirable, and constitutionally impermissible whisper." *Id.* at 76a. Furthermore, parties must "continue to function as they have in the past" in order to preserve the "stability and consistency of our competitive electoral process." *Id.* The Second Circuit reversed this decision, claiming no party evidence of lack of corruption, and rejecting the unique role of parties, and erroneously based its holding on this Court's decision in *Colorado II*. *Id.* at 176a-78a.

A. There is no evidence that political parties in Vermont act as conduits for contributions from donors to candidates.

In *Colorado II*, this Court considered a federal law imposing robust limits on a party's coordinated spending for a candidate. 533 U.S. 431; 2 U.S.C. § 441a(d)(3).[18] This

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[18] 2 U.S.C. § 441a(d)(3) allowed parties to spend in coordination with a Congressional candidate the greater of $20,000 (adjusted for inflation, § 441a(c)) or two cents multiplied by the voting age population. In 2000, the Senate limits ranged from $67,560 to $1,636,438; the House limits ranged from $33,780 to $67,560. *Colorado II*, 533 U.S. at 439 n.3. Vermont's limits of $200-$400 are much lower.

Court applied heightened scrutiny, inquiring whether the restriction was "closely drawn" to further a "sufficiently important government interest in combating political corruption." *Colorado II*, 533 U.S. at 456 (citations and quotation marks omitted).

This Court held that the *evidence demonstrated* "beyond serious doubt" that contribution limits to candidates would be eroded if coordinated spending were unlimited, *id.* at 457, since there was "substantial evidence" that candidates, contributors, and parties had tested the limits of the law. *Id.* Because political parties were found to be conduits for some contributors who sought to support a specific candidate through contributions to a party, *id.* at 451-52,[19] unlimited coordinated spending by a party could raise the risk of real or apparent corruption though circumvention of candidate contribution limits. *Id.* at 456.

In this case, however, the courts below found no evidence that candidate contribution limits are circumvented by donors that contribute to parties in order to benefit a specific candidate. There is no evidence of a tally system or of special clubs set up for large contributors.[20] But most importantly, the Vermont Republican

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[19]This Court based this conclusion on record evidence that the Democrat Party utilized a method known as "tallying," a system that "helps to connect donors to candidates through the accommodation of a party." *Colorado II*, 533 U.S. at 459. A former Democrat senator explained that "[d]onors would be told the money they contributed could be credited to any Senate candidate." *Id.* This Court also found that the Democratic Senatorial Campaign Committee had set up exclusive clubs for large contributors, who were invited to meet with Senators and candidates. *Id.* at 461 n.25.

[20]In addition, a political party in *Colorado II* could "spend money in support of a candidate without legal limit so long as it spends independently. A party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and

Party here does not seek to make unlimited contributions to its candidates, but only reasonable ones and the limits here are set too low. Because of the many differences between the two cases, the Second Circuit's reliance on *Colorado II* was misplaced.

B. Because of the differences between political parties and other contributors, political parties are entitled to robust contribution limits to their candidates.

The notion that a political party would seek to corrupt its own candidates is contrary to the consensus among political scientists that political parties and their candidates have uniquely shared interests, because (1) a party recruits and nominates its candidates and is his or her first and natural source of support and guidance, (2) a candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books, (3) a successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns, (4) a party's public image largely is defined by what candidates say and do, (5) a party's candidate is held accountable by voters for what his or her party says and does, and (6) a party succeeds or fails depending on whether its candidates succeed or fail. Individual and special interest contributors do not share comparable ties with a candidate.

Further, political parties have a different primary goal to achieve than other contributors – political parties contribute to their candidates in order to gain a majority, while others contribute to gain support for their public policy agenda. Left to their own devices, political parties

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any viewpoint." 533 U.S. at 455. In contrast, parties in Vermont cannot spend independently, without legal limit, due to the broad related expenditure provision.

tend to target their limited resources on challengers in competitive races. Non-ideological political action committees representing economic interests, however, tend to contribute to incumbents. Tr. X-149-51. The difference in contribution strategies is explained by their different motivation. Political parties pursue an "electoral" strategy, to gain or keep a governing majority, which is best achieved by supporting challengers (or vulnerable incumbents) in competitive races. Tr. X-149-50. Economic PACs, however, recognize that incumbency is the best predictor of election results, so contributing to incumbents helps maintain relationships with those most likely to affect the PAC's interests (and to avoid offending them by giving to challengers). Tr. X-149-50. Political scientists refer to this as a "legislative" strategy. Tr. X-149-50.

In fact, "targeting" by political parties is good for democracy, promotes more competition, helps challengers overcome the natural advantages of incumbency, equalizes competition, decreases the influence of the wealthy, and gives the voters more choice. Tr. VIII-139-41. Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns." Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 Am. Rev. Pol. 171, 171-89 (1994). Both the Plaintiffs' and the State's expert witnesses agreed that an expanded role for parties in the financing of candidate campaigns would be healthy for the electoral process and would actually remedy many of the perceived problems raised by proponents of Act 64. Tr. VIII-133-34, 143-44; Tr. X-150-52.

Vermont's new contribution limits, however, would severely weaken political parties. Tr. VIII-103. This "decline of party strength inevitably will enhance the influence of special interest groups whose only concern

all too often is how a political candidate votes on a single issue." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting). Since there is no record evidence that contributors to political parties in Vermont are seeking to corrupt their candidates, the low contribution limits from political parties to candidates are not justified.

C. Further, the low party contribution limits to candidates would have a severe impact on political dialogue, preventing candidates from mounting effective campaigns, and, thus, do not survive heightened scrutiny.

Act 64's limits on contributions from parties to candidates will severely weaken the ability of candidates to raise the funds necessary for effective advocacy. The evidence establishes that many candidates will lose a large portion of their funds, which will prevent candidates from engaging in effective advocacy.

Plaintiffs' expert Clark Bensen analyzed several 1998 House races targeted by the Vermont Republican Party. Those targeted challengers would have been deprived of an average of $1,500 each in Republican Party contributions under the new limits or 30% of the funds they raised. Ex. VII, E-2602. Each of these candidates were challengers who won their races against incumbents. State expert Gierzynski also compiled a detailed report of the Republican Party's contributions in 1998 and concluded that the Republican Party had concentrated its resources on a few races and had given more than the new limits would allow. Tr. X-153-54.[21] The new contribu-

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[21] In 1998, the Republican Party contributed to 38 out of 126 candidates for the House. Ex. III, E-1012. Thirty of those contributions exceeded the $200 limit. Ex. III, E-1013.

tion limits, combined with the single source rule,[22] dramatically impact the Republican Party's ability to support its own candidates and will adversely impact candidates' campaigns.

In addition to losing direct monetary contributions, candidates will lose in-kind contributions of donor and voter lists, which are subject to the candidate contribution limits. Tr. I-167. This would have a particularly adverse impact, which concerned the District Court: "[P]olitical parties have traditionally done this . . . if you literally apply Act 64 to these lists . . . there's no way that a political party could ever share names of supporters with their candidates." Tr. IV-142-43. These lists are important to candidates so that they can communicate with voters and solicit contributions.

Parties also engage in other activities that are important to effective campaigning by candidates. During the 1998 election cycle, the Republican Party spent $200,000 to $300,000 on get-out-the-vote and absentee ballot programs which were often coordinated with particular candidates. Tr. I-194-95. Because of Act 64's "related expenditure" provision, these activities are treated as contributions and would have to be done by the candidates themselves or by the party completely independently, which would be less effective. Tr. I-168.

Candidates will lose substantial campaign funds under the limits on contributions from parties, restricting their ability to amass the necessary resources for effective advocacy. Therefore, the party contribution limits to candidates are too low to survive heightened scrutiny.

D. Furthermore, Vermont's low contribution limits from parties to their candidates undermine

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[22]All units of political parties are aggregated as a "single source" for purposes of the contribution limits.

the parties' ability to engage in effective advocacy, the purpose for such political association, which means that they are unconstitutional.

Because of the majoritarian goals of parties, "[c]ontributing money to candidates is a major means by which political parties define their existence." P.A. 47a. The purpose of parties is thus frustrated by the low contribution limits, which unconstitutionally preclude them "from effectively amplifying the voice of their adherents," *Shrink*, 528 U.S. at 387 (citing *Buckley*, 424 US. at 22), thereby thwarting the purpose of the association of "enabl[ing] like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22; *see also FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association").

1. Political parties are political associations formed to engage in effective advocacy.

Political parties play a constitutionally significant role in American political life:

> It is this ability and propensity of our citizenry to unite and pursue desired goals that form the foundation of American political thought. Indeed, the very existence of this nation stands as a testament to the efficacy of political organization.
>
> The bundle of freedoms bestowed by the first amendment, often perceived as safeguarding the individual from the will of the group, also serves to protect the group against the tyranny of the state. Having just emerged from an impassioned struggle for independence, the framers appreciated that effective political change could best be achieved through collective

> activities, and further recognized that the right to associate for political purposes was a natural concomitant of the right to espouse political views.

Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 267 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986); *see also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989). Moreover, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). A political party's association with its own candidates enjoys heightened protection because a party's nominee "becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* at 575.

2. Act 64's limits on political parties prevent them from engaging in effective political advocacy.

Plaintiffs' expert Professor Gerald Pomper is a founding member of the Committee for Party Renewal, which in 1984 adopted a manifesto entitled "Principles of Strong Party Organization," Ex. VII, E-2471-78, which can be used as a diagnostic tool to evaluate the effects of campaign finance restrictions on the effectiveness of political parties. Tr. VIII-104. The *Principles* are:

- Political parties should govern themselves.
- Political party organizations should be open and broadly based at the local level.
- Political parties should advance a public agenda.
- Political parties should be effective campaign organizations.

- Political parties should be a major financier of candidate campaigns.

Professor Pomper performed this evaluation and found that Act 64, "[i]n all but explicit language . . . essentially abolish[es] political parties from Vermont . . . and more fundamentally, the statutes subvert basic principles of democracy." Ex. VII, E-2463.

Under the Principle "Political parties should be a major financier of candidate campaigns," Pomper testified that parties "do a kind of triage." Tr. VIII-139. Parties give little to candidates who are sure to win or lose; instead, they "concentrate on the ones which are closely competitive." Tr. VIII-140. But the limits on contributions to candidates by parties, coupled with treating much traditional party voter registration and get-out-the-vote activity as in-kind contributions, "severely weakens the political parties in Vermont . . . [because] it severs any relationship . . . between the political parties and the candidates, and worsens the electoral process in the state." Tr. VIII-103. In sum, Pomper concluded that Act 64 violated each of the above Principles to the detriment of the political process in Vermont. Tr. VIII-104, 106-07, 119-20, 132-33, 140-41.

Furthermore, low contribution limits frustrate the electoral goals of political parties by making it more difficult for them to help challengers. State expert Gierzynski testified that when political parties are unfettered by low contribution limits they tend to focus their resources by giving large amounts to challengers in competitive races. *See* Ex. VIII, E-2748. Because of this, campaign finance laws ought to have higher contribution limits from political parties than from other contributors. Tr. X-151-52; Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 Am. Rev. Pol. 171, 171-89 (1994); Anthony Gierzynski,

Money Rules: Financing Elections in America 121-22 (Westview Press 2000). The limits here do the opposite by preventing them from engaging in effective advocacy for their targeted candidates, ultimately frustrating the parties' electoral goals, the purpose of their association. As a result, Vermont's low contribution limits from parties to their candidates fail heightened scrutiny.

VI. Vermont's Mandatory Candidate Expenditure Limits Violate the First Amendment.

Act 64 imposes mandatory spending limits on candidates: $300,000 for governor, $100,000 for lieutenant governor, $45,000 for other statewide offices, $4,000 for state senator (plus an additional $2,500 for each additional seat in the same senate district), and $2,000 for a single member and $3,000 for a two member house district.[23] 17 V.S.A. § 2805a(a). However, no principle is more settled than that government-imposed expenditure limits on political speech, particularly by candidates, are repugnant to the First Amendment. *Buckley*, 424 U.S. at 58; *NCPAC*, 470 U.S. at 493-94; *Colorado I*, 518 U.S. at 614-16.

> A restriction in the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, 424 U.S. at 19.

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[23]Additionally, statewide incumbents are limited to 85 percent of the mandatory spending limits and incumbent senate and house members to 90 percent. 17 V.S.A. § 2805a(c). Amendments to Act 64, effective July 1, 2005, provide that the expenditure limits shall be adjusted for inflation. 17 V.S.A. § 2805a(e).

Under Vermont's campaign scheme, once candidates have spent their expenditure allowance, they are muzzled. At that point, they are unable to effectively respond to criticism from the press and groups that spend independently, who can do so without limit. Furthermore, candidates are even prohibited from driving their family car to a town square to speak once the limit has been met. Thus, candidates have no "alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989). Vermont has relegated candidates to bit players in their own elections.

A. There are no compelling interests sufficient to limit candidate expenditures.

"Regulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Buckley* 424 U.S. at 44-45; *NCPAC*, 470 U.S. at 496. The Second Circuit held that an anti-corruption interest, when added to the interest in protecting the time of elected officials, was sufficient to uphold mandatory candidate expenditure limits. P.A. 145a. The majority remanded the case to the District Court to determine whether the limits were narrowly tailored to further those interests. *Id.* at 96a-97a. Judge Winter disagreed that the interests were compelling, explaining that each of the interests "has already been considered and rejected by the Supreme Court." P.A. 258a (Winter, J., dissenting) (citing *Buckley*, 424 U.S. at 44-45).[24]

1. Preventing the reality or appearance of corruption is not a compelling interest.

The anti-corruption rationale employed by the courts

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[24]Further, combining the two interests does nothing to make either compelling. "[A] synergy of nothing with nothing" is still nothing. P.A. 337a (Jacobs, J., dissenting).

below, however, has consistently been rejected as a justification for spending limits, *Buckley*, 424 U.S. at 45; *Colorado I*, 518 U.S at 618; *NCPAC*, 470 U.S. at 489; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978), because there is no relationship between corruption and expenditures. "There is nothing invidious, improper, or unhealthy in permitting . . . funds to be spent to carry the candidate's message to the electorate." *Buckley*, 424 U.S. at 56.

The Second Circuit rationalized applying the anti-corruption interest by asserting that "*Buckley* was 'decided on a slender factual record,'" P.A. 117a, and that the factual record presented by the State could be sufficient to distinguish *Buckley*. *Id.* at 135a. However, the record in *Buckley* was far from "slender:" *Buckley*

> contained *over 700 pages* of statistical and testimonial data and findings of fact . . . includ[ing] data from opinion polls on public perceptions of politicians, political participation, expenditure limits, and cynicism about government, detailed catalogs of specific contributions by labor unions, PACs, and business organizations to individual candidates . . . and evidence that elected officials give preferential access to large contributors.

P.A. 259a-60a n.23 (Winter, J., dissenting) (citations omitted) (emphasis added). This Court had a full evidentiary record before it when it decided that the anti-corruption interest is not compelling and cannot support expenditure limits.

This is true even if the corruption interest is defined only as gaining "privileged access," which the court below thought was adequate. P.A. 101a. While the circuit court in *Buckley* noted that "[l]arge contributions are intended to, and do, gain access to the elected official," *Buckley v.*

Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), this Court still held that the concern about "improper influence," 424 U.S. at 27, 45-46, a much stronger term, was insufficiently compelling to justify expenditure limits. *Id.* at 55. Having found something akin to "bribes" as insufficient, this Court "hardly had to go on to say that access or the appearance of access – returning or taking a phone call from a donor – was also not compelling." P.A. 259a (Winter, J., dissenting).

2. *Buckley* rejected the interest in protecting incumbents' time from the burden of fundraising.

The Second Circuit held that Vermont's interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties," P.A. 135a, such as "independently studying legislative proposals or meeting with constituents," *Id.* at 142a, is compelling, when considered in tandem with the anti-corruption interest. *Id.* at 144a (quotation marks omitted).

The Second Circuit, seeking to minimize *Buckley*'s dismissal of this interest, maintained that this Court "alluded to this time-protection interest only in passing."*Id.* at 137a (citing *Buckley*, 424 U.S. at 91, 96). However, the interest in protecting candidates' time by alleviating the burden of fundraising was considered and rejected in *Buckley*. The time-protection rationale

> was relied upon by the Court of Appeals in *Buckley* in upholding the statute, was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

P.A. 263a-65a (Winter, J., dissenting) (footnotes omitted). The time-protection interest "was, understandably, given only passing attention by the Court because it is not compelling in any sense." *Id.* at 273a; *see Buckley*, 424 U.S. at 55 ("No governmental interest that has been suggested is sufficient . . . .").

In regard to the allegedly related interest in ensuring that incumbents attend to their duties, Chief Judge Walker noted

> [T]he government has *no legitimate interest* in keeping incumbents in office at the expense of challengers. Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, "The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier." It has an interest in the former, but certainly not the latter. The decision to fundraise is the candidate's and, unless incumbent protection is a legitimate interest, not the business of the legislature.

P.A. 330a (Walker, C.J., dissenting) (emphasis in original); *see also Homans v. City of Albuquerque*, 366 F.3d 900, 919 (10th Cir. 2004) (Tymkovich, J., concurring, writing for the panel) ("Freeing politicians from having to make th[e] choice [between doing their official duties and fundraising] is not a compelling governmental interest.").

Furthermore, the record is practically void of evidence of specific amounts of time spent fundraising by incumbents or the amount of time which this takes from official duties. "To the extent that a particular amount of time was described, it was brief, such as an afternoon. Trial Tr. vol. IX at 151 (Elizabeth Ready) ('That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door.')." P.A. 274a

(Winter, J., dissenting).[25]

3. There are no compelling interests that justify limiting candidates in spending their own money on their campaigns.

This Court in *Buckley* struck down a ceiling on personal expenditures by candidates for their own campaigns, because it "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression," and because "prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds." 424 U.S. at 52-53.

Because Vermont's expenditure limits apply to a candidate's own funds, the asserted interests here are not applicable even if valid in other circumstances. A candidate cannot sell access to himself and he is not burdened with fundraising when he spends his own money. As a result, the expenditure limits are unconstitutional.

B. The expenditure limits are unconstitutionally low.

Even if candidate spending limits are somehow consistent with the First Amendment, the limits here are too low, because they will prevent candidates from

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[25]Finally, Vermont has enacted "circular, self-justifying" legislation by adopting "laughably low" contribution limits which "require candidates to spend more time fundraising than would higher limits. In other words, the Vermont law's contribution limits increase demands on candidates' time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified," P.A. 330-31a (Walker, C.J., dissenting). The Second Circuit essentially acknowledged this. P.A. 150a. If this interest were bona fide, Vermont could simply raise the contribution limits. P.A. 336a (Jacobs, J., dissenting) (rejecting the argument that "*more-restrictive* expenditure limits" are justified "to mitigate the inevitable and predictable side-effect of the *less-restrictive* contribution limits").

"amassing the resources necessary for effective advocacy." *Id.* at 21 (discussing contribution limits). The extensive record compiled in this case demonstrates that, far from being narrowly tailored to any of the State's asserted interests, these limits "are so laughably low that they cannot but impede meaningful debate of public issues," P.A. 344a (Cabranes, J., dissenting), and "are so low that they are unconstitutional by any reasonable test." P.A. 255a (Winter, J., dissenting).

1. Vermont's expenditure limits reduce candidates' historic efforts to communicate with voters.

Act 64's expenditure limits are set considerably lower than those in *Buckley* and would have a far more dramatic impact on spending. In *Buckley*, the spending limits had been exceeded by 17 of 66 (26%) major party Senate candidates and by 22 of 810 (3%) major party House candidates in the immediately preceding election. 424 U.S. at 20 n.21. In contrast, Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998, and 27% of such senate campaigns and 10% of house campaigns spent more than double the new limits. Ex. VII, E-2351. In statewide races, the State's expert reported that the spending limits were exceeded by 12 of the 29 (41%) major party contenders for statewide office between 1994 and 1998. Ex. III, E-0961. These numbers underestimate the true percentages because they include non-competitive races and do not include related expenditures.[26]

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[26] As Chief Justice Walker pointed out in his rehearing dissent: "Because Act 64 defines candidate expenditures to capture related expenditures by supporters, just to keep spending under the new law at historical levels would require setting expenditure limits *above* those historical levels." P.A. 332a (citation omitted) (emphasis in original).

Moreover, the focus should be on competitive races, where the impact would be severe. Of the 14 Senate candidates targeted by the Republican party in 1998 as the most competitive, 12 spent more than the new limits, and five spent more than double. Tr. I-196; Ex. VII, E-2354-58. Of the 17 House candidates targeted by Republican Party, 16 spent more than the new limits would allow, 9 of these spent more than double, and 4 of them spent more than triple. Tr. I-197; Ex. VII, E-2362-75.[27]

2. Vermont's expenditure limits will prevent effective candidate campaigns.

Vermont's expenditure limits prevent effective campaigns. The trial evidence demonstrated that Vermont's limits on spending in statewide races is far too low to allow most candidates to mount effective campaigns. Detailed testimony was provided by Kathy Summers, who was campaign manager for Ruth Dwyer's campaign for governor to unseat long time incumbent Howard Dean. To run an effective campaign, Dwyer would need "between 600 and $800,000." Tr. IV-81. If the campaign was limited to less than half this sum, severe cuts would have to be made. Each of the principal components of an effective campaign, direct mail, media, an effective grass roots organization, and a get-out-the-vote drive, Tr. IV-80-81, would be severely hampered.

Although direct mail is the most effective way to draw small-dollar contributions in Vermont, it is too expensive to use under the low spending limits and would have been abandoned. Tr. IV-82-83. The Dwyer campaign's

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[27]The level of spending after the trial also surpassed the expenditure limits. The major party candidates in the last two gubernatorial elections in Vermont spent two or three times more than the limits. P.A. 239a (Winter, J., dissenting). All three candidates in the last race for Lieutenant Governor exceeded the limits by 38% - 63%. *Id.*

town meeting tour would be undermined since effective town meetings require a preceding and follow-up town-wide mailing. Tr. IV-90-91. When the campaign used such mailings, they drew 80-100 people, but without them attendance dropped to 30-40 people. Tr. IV-107-08.

Dwyer's grass roots efforts would have been eviscerated because she could not hire sufficient staff to coordinate volunteer efforts or be able to do prospective direct mail to identify potential volunteers. Tr. IV-92-94. The limits would thereby "take[] away two of the most important mechanisms that I have to be able to build a grass roots network." Tr. IV-94. Moreover, the Dwyer campaign's get-out-the-vote efforts would have been cut by 70%, Tr. IV-97-98, and its media budget cut in half. Tr. IV-95-96.[28]

The Second Circuit, however, rejected Plaintiffs' claim that much higher amounts than allowed by the expenditure limits were necessary to wage effective campaigns, P.A. 154a-55a, because the District Court found that average spending in the last three election cycles was at or below the expenditure limits. P.A. 42a-43a.[29]

Past average spending fails to account for future elections that involve controversial issues, where public

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[28]William Meub, Dwyer's Republican primary opponent, also testified that under the expenditure limits "we are going to be limited in this campaign to only being able to run three ads," which was half as many as one Vermont U.S. Senator had recently spent against "a straw candidate." Tr. IV-29-30.

[29]The District Court's review of past campaigns was too limited. For instance, in 1988, spending on the gubernatorial campaign exceeded one million dollars. Ex. VII, E-2397. From 1980 to 1998, the average spending on the seven races for U.S. Senate was $1.418 million for the top two vote-getters; for the U.S. House it was $647,000. Ex. VII, E-2397. All these were statewide races, where candidates attempt to run effective campaigns.

interest is high, and where the direction of the state could be decided. For example, more money was spent in the 2000 election than in any prior Vermont election, because civil unions, same-sex marriage, and other controversial issues were at stake. P.A. 238a (Winter, J., dissenting). In addition, the related expenditure provision was not a part of Vermont law before Act 64 and, therefore, was not accounted for in calculating past spending. *Id.* at 234a. As a result, the past spending averages grossly underestimate the amount candidates would actually "spend" in the future.[30]

For an unknown challenger to run an effective campaign, it would cost $4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor. *See supra* note 12. The expenditure limits here are woefully inadequate.[31]

C. Vermont's spending limits disproportionately harm challengers.

Just as too low contribution limits benefit incumbents, *Shrink*, 528 U.S. at 404 (Breyer, J., concurring), too low expenditure limits could "insulate [incumbents] from effective electoral challenge." *Id.* at 402. As set forth extensively above, the meager expenditure limits do not allow challengers to overcome incumbents' advantages.

This should not be surprising since the justifications for Act 64 all center around incumbent protection. The

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[30]Past spending averages also do not include the costs of compliance with the new, complicated Act. P.A. 235a (Winter, J., dissenting). The burdensome related expenditure provision could very well necessitate the hiring of additional staff to monitor related expenditures. *See id.* at 226a; *see also id.* at 231a.

[31]Candidate expenditures in the two statewide elections since the enactment of Act 64 have far exceeded Act 64's expenditure limits. P.A. 239a-40a (Winter, J., dissenting).

time-protection "interest" "is less about increasing person-to-person contact with voters than it is about limiting their opponents' overall contact with voters." P.A. 275a (Winter, J., dissenting). Further, measuring "effective campaigns" by whether a campaign achieves only a "level of notice" ensures that "an incumbent's campaign starts at the 'level of notice' at which a challenger's campaign may be stopped by government." *Id.* at 285a. And the dreaded "arms race," which the State seeks to stop at all costs, refers, in reality, "to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

Vermont provides that incumbents can spend only 85%-90% of the limits. 17 V.S.A. § 2805a(c). William Meub described this as a "farce," since the "incumbency handicap" should be 50%. Tr. IV-31. There is no evidence in the record that this "fig leaf" is "sufficient to overcome the numerous and powerful advantages of incumbency." P.A. 339a n.6 (Jacobs, J., dissenting).[32]

D. There are less restrictive alternatives.

The limits are not narrowly tailored because there are less restrictive means to prevent the reality and appearance of corruption. "The interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Further, there are less restrictive means of protecting candidates' time. Contribution limits could be raised so that candidates can raise more money from their existing donors, the State could provide

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[32]Exacerbating the harm to challengers, the limits apply over a two-year period. This means that candidates must divide their expenditure amounts between primary and general elections. Because incumbents face primary challengers less often than non-incumbents, they will generally have more money left for the general election.

additional staff to allow officeholder candidates to attend to their official duties more efficiently, and Vermont could provide for public financing with spending caps for those that elect to receive public funds. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights, and they have been approved by this Court.

VII. Vermont's Presumption of Coordination Provision Is Unconstitutional.

Act 64 includes a presumption that an expenditure made by a political party or political committee that benefits six or fewer candidates is a "related expenditure," subject to candidate contribution and expenditure limits. 17 V.S.A. § 2809(d). The Second Circuit, in a cursory, three-paragraph discussion, upheld the presumption, as it related to the contribution limits,[33] because it is rebuttable rather than conclusive. P.A. 183a-84a. The court summarily announced that "[t]he Constitution does not bar the use of rebuttable presumptions in this context." *Id.* at 183a.

The Second Circuit, however, failed to recognize the unconstitutional burden that this "rebuttable" presumption imposes on First Amendment rights. While the court conceded that "an accused party" can be forced into a court proceeding, *Id.* at 184a; *see* 17 V.S.A. § 2809(a), (e), it diminished this heavy burden[34] by stating that "there are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent." P.A. 184a. However, such rebuttable presumptions

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[33]The court, however, remanded consideration of the related expenditure provision as it relates to "expenditures." P.A. 189a.

[34]It is well established that subjecting First Amendment freedoms to investigation itself can unconstitutionally burden these freedoms. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

require private parties to "bear the costs of litigation and the risk of a mistaken adverse finding," which "must necessarily chill speech in direct contravention of the First Amendment[]." *Riley v. National Federation of the Blind*, 487 U.S. 781, 794 (1988). Moreover, the presumption unfairly places on the candidate and the political organization the burden of proof to prove a negative – that coordination did not take place. [35]

But ultimately the greatest burden is that it converts constitutionally protected independent speech to speech subject to contribution and expenditure limits by failing to require actual "prearrange[ment] or coordinat[ion] . . . with the candidate or his agent." *Buckley*, 424 U.S. at 47. Only expenditures that are "controlled by or coordinated with" a candidate may be treated as contributions. *McConnell*, 540 U.S. at 219. This Court has "repeatedly . . . struck down limitations on expenditures 'made totally independently of the candidate and his campaign,'" *Id.* at 221 (quoting *Buckley*, 424 U.S. at 47).

The First Amendment places the burden of persuasion on the government to show that the speech is protected. *Francis v. Franklin*, 471 U.S. 307 (1985). Thus, a mandatory presumption, even a rebuttable one as here, *see id.* at 317, imposes an unconstitutional burden on speech if it shifts the burdens of proof or persuasion from the government to the speaker to prove that the speech is protected. *Speiser v. Randall*, 357 U.S. 513, 526-28 (1958). Furthermore, the "connection between the two facts" must be "accurate in the run of cases." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

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[35] Furthermore, the candidate and the political organization face steep civil penalties, if the expenditure is found to be related and it surpasses the applicable contribution and/or expenditure limits, of up to $10,000 for each violation. 17 V.S.A. § 2806(b).

This is not true here since "prearrangement or coordination" has nothing to do with the fact that the ad mentions six or fewer candidates.

In *Colorado I*, this Court struck down a presumption that all party spending is coordinated, holding that "*convincing evidence* [that] . . . a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system" is required. *Colorado I*, 518 U.S. at 617-18 (emphasis added). Coordination of expenditures requires factual evidence of coordination, and "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Since Act 64's presumption does not require the government to prove that "related" expenditures are actually prearranged, coordinated with, or controlled by a candidate, the presumption unconstitutionally sweeps in independent expenditures, "significantly impair[ing] the ability . . . to engage in direct political advocacy and 'represent[ing] . . . substantial . . . restraints on the quantity and diversity of political speech.'" *Id.* at 615 (citations omitted).

VIII. The State's Arguments Would Justify a Government Ban on Privately Funded Campaigns.

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91. Vermont seeks to reverse this presumption by imposing draconian restrictions on the speech of candidates, which it justifies by "broadly defined" interests in corruption and incumbent time-protection. If accepted by this Court, Vermont will have justified more than its "laughably low" contribution and expenditure limits. It will have justified abolishing privately funded campaigns.

First, the State seeks to justify limiting all contributions, not just those that are large enough to give rise to a perception of corruption. Application of the anti-corruption interest to all contributions "extend[s] *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions." *Carver*, 72 F.3d at 639. This result would effectively remove candidate contributions from the protection of the First Amendment and provide a justification to abolish all private funding of campaigns.

Second, the State broadly defines "corruption" to include "special access or the appearance of special access of donors to officeholders," the influence of "bundled" contributions, and decreasing "citizen confidence in the electoral process." P.A. 255a (Winter, J., dissentig); P.A. 128a-35a. There are two types of "special access" identified by the Second Circuit, "the fundraising system," P.A. 101a, and "officials . . . more likely to return donors' phone calls." *Id.* at 140a. A key fundraising method is "selling access," for example, fundraising events where candidates or public officials appear and the attendees pay to attend. If fundraising receptions or dinners are inherently corrupt, then a key element of fundraising for all campaigns can be abolished. Further, it is only human nature to be grateful to one's supporters, whatever the nature of that support, and to return their phone calls. If natural human gratitude is now corruption, then certainly corruption will infect all of politics and private funding of campaigns can be abolished, and maybe even elections themselves.

"Bundling" is where "special interests" provide financial support "by way of 'bundling' smaller contributions from a particular company or industry." *Id.* at 133a. While the Second Circuit acknowledged that *Buckley* seemed to dismiss this concern in footnote 64, *id.*, (citing *Buckley*, 424 U.S. at 56 n.64) ("If a senatorial candidate

can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communications?") (internal quotation marks omitted)), this Court went further than that, in upholding the FECA's contribution limit, by emphasizing, rather than bemoaning, the fact that "persons [remained] free" to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *Buckley*, 424 U.S. at 28, and citing the fact that "the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 28 n.31. But if multiple lawful contributions from people with a shared interest is corruption, then nothing short of abolishing private funding of campaigns will stop it.

"Citizens' confidence in the electoral process" is certainly desirable, but it is defined broadly here as "Vermonters . . . troubled by how money influences campaigns," P.A. 56a, "voters . . . extremely concerned about the influence of special interest in the political process," P.A. 130a, and "94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would 'reduce the power of special interests.'" *Id.*. This is simply a description of the healthy scepticism that the American people have about politics and politicians and, if credited with the power to uphold the limits here, would justify abolition of private funding of campaigns generally.[36]

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[36]If this description of corruption were extended to the "perception of corruption" and is credited, even without factual support, it would have no bounds. A subjective perception of corruption that has no basis in fact cannot be refuted. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Furthermore, it is a "quintessential self-fulfilling prophesy." P.A. 277a (Winter, J., dissenting).

Third is the concern of the Second Circuit that "candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests" and are concerned "about the reaction of contributors." *Id.* at 131a. Of course, in a representative democracy, politicians will be concerned about the reaction of people generally, and of their supporters, or potential supporters, particularly, to their actions in office. It would be both silly and dangerous to define corruption this way.

> If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislators could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

Russell v. Burris, 146 F.3d 563, 569 (8th Cir. 1998); *see also McCormick v. U.S.*, 500 U.S. 257 (1991) (reversing legislator's Hobbes Act conviction for soliciting a campaign contribution and then introducing legislation favorable to the contributor).

Finally, if the desire for campaign cash to fund an "arms race" can justify both 'laughably low" contribution and expenditure limits, it is sufficient to ban all privately funded campaigns,[37] and the reversal of the presumption

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"The confidence of Vermont citizens in their state government is unlikely to be substantially enhanced so long as Act 64's proponents make unsupported claims about the corrupt nature of that government." *Id.* 277a.

[37]The breadth of these arguments and their effect on private funding of campaigns should not be surprising, since one of the prime supporters of Act 64, and counsel for the Respondent-Intervenors, is the National Voting Rights Institute, which considers "Getting money out of politics [to be] the unfinished business of the Voting Rights

of the First Amendment would be accomplished. The government will have taken away the core of the First Amendment, leaving only its periphery.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A. §§ 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.

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Movement." http://www.nvri.org/about/wealth.shtml (last visited Dec. 2, 2005). This organization has brought several lawsuits to have privately funded campaigns declared unconstitutional. *See, e.g., Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996); *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999).

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NOS. 04-1528, 04-1530 & 04-1697

In the
SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
Petitioners / Cross-Petition Respondents,

v.

WILLIAM H. SORRELL, *ET AL.*,
Respondents / Cross-Petitioners,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
Respondent-Intervenors / Cross-Petitioners.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

Brief Of Respondents/Cross-Petitioners William H. Sorrell, *Et Al.*

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party that primarily benefits six or fewer candidates is presumed to be a coordinated expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Petition Respondents in No. 04-1697*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Petition Respondents in No. 04-1697*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for a Writ of *Certiorari* in No. 04-1528 was placed on this Court's docket on May 16, 2005. Pursuant to Rule 12.5, the Conditional Cross-Petition of William H. Sorrell, *et al.* (the "State") and Vermont Public Interest Research Group, Inc. ("VPIRG"), *et al.*, No. 04-1697, was timely filed by transmitting it to the Clerk of the Court on June 14, 2005. Jurisdiction lies under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Act 64

A. The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in politics. The 65 hearings, at which 145 witnesses testified, unequivocally demonstrated that, despite existing contribution limits and disclosure laws, Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. Randall Petitioners' Appendix ("P.A.") 31a-32a.

The Legislature made detailed Findings that set forth Act 64's purposes and the conclusions that body drew from the record before it. The Findings specify how large campaign contributions and unrestrained campaign expenditures reduce public confidence in government, pressure officials to give access and respond to large contributors in preference to those who can afford to give little or nothing, increase the appearance that officials are unduly influenced by monied interests at the expense of the best interests of Vermont citizens, marginalize regular citizens from the political process, force officials to divert their time and energies from their duties to limitless fundraising, decrease robust debate of issues and candidate interaction with the public, and financially prevent many Vermonters from seeking public office. Joint Appendix ("J.A.") 20-23.

The Legislature concluded that a carefully drawn law containing both expenditure limits and contribution limits would work directly to remedy all of the above ills; would restore integrity to the electoral process; would permit healthy, vibrant and effective campaigns; and would ensure the Vermont Constitution's directive that "'all elections ought to be free and without corruption.'" P.A. 35a (quoting Vt. Const. ch. I, art. 8).

B. Significant testimonial and documentary evidence gave full support to the Findings. Even with Vermont's prior contribution limits, the record showed how the need for unlimited cash allowed contributors and groups of contributors to obtain preferential access and exert undue influence over officials. Governor Howard Dean confessed that: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." P.A. 93a-94a; *see* Exs.[2] I:92; II:732 (access and attention are commodities). The President of the Senate, Peter Shumlin, admitted that his decisions are sometimes made "based upon that whole lot of money I raised." Ex. I:291; *see* Exs. I:205 (money "plays a role in decisions"); III:795-97 (former Treasurer bowed out of re-election race after awarding no-bid contracts to firms that had contributed to his campaign); II:425-26 (influence of monied interests helped defeat bottle bill); I:217 (contributions given to obtain influence); II:503 (same); II:492 ("money buys influence"); I:349 (officials "more accountable" to contributors); II:428 (money controls candidates); I:369-70 (concern over "purchase of influence"); I:217 (unsolicited corporate donations were made to influence); I:405-06 (lobbyists can influence officials' decisions based on past giving and future need).

The Legislature heard that parties and candidates, too, exploit such a system by seeking funds from those who regularly come before them. Exs. II:511 (aggressive targeting

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[2] Ex. __ and Tr. __ refer to the pages of the binders of trial exhibits and transcripts that comprised the record in the court of appeals.

of lobbyists for contributions); II:505 (lobbying and contributing "inextricably...linked"); I:299-300 ("close" connection between contributions and support of positions); I:203 (similar).

The Legislature was further aware that such dubious practices, and numerous others, had been reported to the people of Vermont through the media, thereby fueling the public perception that officials are unduly influenced by large contributions and the overwhelming need for campaign cash.[3]

The State's regime of large contributions and unrestricted spending, lawmakers learned, had left many Vermonters on the outside looking in. A third-generation farmer, for example, testified that small family farmers typically cannot afford to contribute money to political candidates, and thus cannot obtain the influence held by many corporations. Ex. I:374-75, 92 ("average Vermonter can't afford the price of admission" to political system).

In addition, Legislators studied campaign finance abuses that had occurred outside Vermont and sought to guard against them. Exs. V:1737 (Vermont "is at risk of slipping into the same special interest swamp that has become our nation's capital"); V:1735-36 (Republican Party concerned over national scandals reaching Vermont); III:811-26 (press accounts of national campaign scandals); *see also* Exs. I:272, 291-92, 383; II:483-84, 732 (Legislators feared spread of corruption).

The legislative record also showed that the pursuit of campaign monies had become very time consuming.

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[3] Exs. III:747 (concern that tobacco donations caused weakening of anti-smoking bill and that union donations had ensured passage of pro-worker law); III:789 (pressure to secure contributions blocked health care reform); III:785, 787 (contributions made by slate companies to Legislators considering quarry bill); III:805-07, 809-10 (donations by Tobacco Institute followed defeat of tobacco bill); III:747, 763, 777 (public attitudes toward large donations); *see also* Trs. IX:180-84; X:6-9.

Fundraising had diverted officeholders from their official duties, had lessened the amount of time that could be spent with the public, and had limited the scope of the views considered by officials and candidates. Exs. I:204, 209, 353; II:603; J.A. 21 (Finding (a)(11)).

Numerous witnesses additionally testified that Act 64 was necessary to loosen the grip that incumbents had on elections in Vermont. Exs. I:231, 376-77; II:525, 648-49. By limiting incumbents' ability to amass large campaign war chests and greatly outspend opponents, witnesses forecasted that Act 64 would increase meaningful electoral competition. Exs. I:92, 395-96, 371-72, 376-79; II:484, 730.

Based on its own experience and the record before it, the Legislature determined that Vermont's voluntary spending caps, which few had accepted,[4] coupled with contribution limits, had been and would continue to be inadequate to deter political corruption and its appearance, to ensure that officials could devote sufficient time to their duties, and to restore public confidence in government. While contribution limits play a vital role in deterring individual corruption, so long as candidates require ever-increasing pools of campaign cash, they would still be beholden to large, monied interests and distracted from their duties. As a result, the Legislature concluded that limits on candidate expenditures as well as on contributions were necessary to respond comprehensively to the problem.

In setting the appropriate levels for those limits, the Legislature painstakingly considered factors unique to Vermont such as population, media costs, historical information on past spending and contributing in campaigns, Vermont's previous mandatory and voluntary spending limits, citizen polls reflecting the amounts that Vermonters consider to be excessively large donations, its members' own individual experiences as candidates, the testimony of numerous witnesses

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[4] Adherence to voluntary spending limits dropped dramatically between 1993 and 1998. P.A. 28a; J.A. 29, 34.

concerning the appropriate levels for the limits, and the offices to which the limits would apply. Exs. I:92, 254-63, 267; II:443, 533-34, 645-47, 664-80; V:1686-1734; Trs. IX: 203-04, 226-28, X:18-20; *see also* P.A. 32a-33a, 100a. It set the limits at levels assiduously tailored to deter corruption and its appearance while ensuring effective and robust campaigning.[5] It further permitted challengers to spend more than incumbents.

The Legislators also focused on the need to protect against circumvention of Act 64's limits. They imposed limits on party and political committee donations and on expenditures that were coordinated with a candidate. Truly independent expenditures were not restricted.[6]

II. Proceedings Below

A. During ten days of trial, the district court accepted testimony from 34 witnesses, including citizens, officials, candidates, experts and party leaders, and admitted approximately 135 exhibits, amounting to more than 3,000 pages. The court reviewed the legislative record and adopted nine of the Findings supporting Act 64. P.A. 34a-35a; J.A. 20-22.

After weighing the evidence and making credibility determinations, the court concluded that the "threat of corruption in Vermont is far from illusory. Evidence provided by citizen polls and comments by public officials demonstrate that the threat is quite real." P.A. 56a. The public's perception of that corruption is equally clear: "it is beyond argument that the public perceives corruption in the political electoral system." *Id.*

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[5] In 2005, the Legislature tied increases in the expenditure limits to the Consumer Price Index. 17 V.S.A. §2805a(e).

[6] Act 64 combines features from three separate bills. Exs. I:1-25, II:691-706, 707-17. In addition to the challenged limits, it includes reporting provisions, creation of an on-line database with candidate biographies and position statements, and a public funding option for candidates for governor and lieutenant governor. P.A. 1a-20a.

The court ruled that the expenditure and contribution limits of Act 64 directly furthered compelling interests, including deterring actual and perceived political corruption and freeing up officeholders from the demands of fundraising so they can perform their official duties. P.A. 36a-38a, 59a, 63a-66a. It concluded that the levels established for those limits were appropriate for Vermont and would permit effective campaigning. P.A. 39a-44a. Such legislation, the court found, was critical to reverse the erosion of public confidence in elected officials and to maintain the integrity of the electoral system. P.A. 36a-38a, 56a, 59a, 65a-66a. The trial evidence fully supported those determinations.

Trial witnesses recounted numerous examples of the preferential access and treatment given by officials to special interests and large contributors. In stark contrast to ordinary constituents, such persons and entities had their telephone calls returned, obtained meetings with officials, and were afforded a different quality and quantity of attention and responsiveness by politicians. *See* Trs. VII:72-74 (Vermont politicians usually give special consideration to requests from large donors); V:24; VIII:24; IX:167, 194-96.

Evidence demonstrated that such purchased influence impacted or sought to impact a number of governmental actions, including environmental exemptions for the slate industry, modifications in tobacco laws, participation in a land use action, changes to health care reform, defeats of a bottle redemption bill and a food labeling bill, and the creation of a tax exemption. Trs. V:54-56, 183-84; VII:62-74, IX:92-95, 104-09, 120-23, 174-77. The court concluded that consideration of funding sources "frequently shapes the legislative agenda in Montpelier and often determines whether a bill will get enough support from the Senate leadership and committee members to move forward." P.A. 37a.

The need to raise unlimited funds, the court determined, also makes it "increasingly difficult" for officials to pursue

initiatives adverse to large donors and donor groups. P.A. 37a-38a. With an ever-increasing need for monies, candidates always consider what the positions of large funding sources are when staking out a position of their own. Tr. VIII:24-25. Expert testimony from both sides confirmed the link between officials' voting behavior and the sources of their campaign contributions. P.A. 38a.

In addition, the district court validated the Legislature's concern over the public perception of corruption resulting from a system of large contributions and unlimited spending. P.A. 29a, 56a. Sen. Rivers testified that "many ordinary people...believe that their government is not about them, but about powerful, special interests.... [and] that is corrosive and damaging to democracy." Tr. VII:88; *see* Tr. V:170. Plaintiffs' witnesses also recognized the public's concern over the corrupting effect of money in politics. P.A. 36a-37a; Trs. II:212; IV:66-67, 219-20, 259.

To support its finding regarding the perception of corruption, the court further relied upon media reports of officials' comments describing the insidious impact of money on government, and upon survey evidence. P.A. 29a, 37a; Exs. III:763 (Sen. Spaulding: "money is a negative influence on the impartial ordering of priorities and passage or failure of bills"); III:772 (Sen. Shumlin: money "buys access to the system .... [and] it adversely influences a citizen legislature"); Tr. VII:151-52; Ex. III:847-48 (70% of Vermonters believe that the wealthy and large corporations have too much influence over officials, while 74% believe ordinary Vermonters have too little).

Testimony from knowledgeable witnesses also demonstrated that the "arms race" to obtain campaign funds distracts officeholders from their duties and separates them and candidates from interactions with voters. P.A. 38a. Without spending limits, "you become indentured to people who have got the money. So you spend less time on the ideas and more time harvesting the money." Tr. V:116; *see also* J.A. 28

(Landell Plaintiffs' admission). Proof that officials are pulled away from their duties to solicit campaign money from interest groups and donors "came from both Plaintiffs and Defendants." P.A. 36a.

Trial evidence additionally confirms the court's conclusion that candidates can conduct effective campaigns under the spending limits of Act 64. P.A. 43a-44a. Campaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country. *See* Randall Br. 32 (conceding same). For example, Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43.

As the court noted, the low population of Vermont's electoral districts supports the reasonableness of Act 64's spending limits. P.A. 42a. Candidates for statewide office in Vermont compete for votes from a population that is smaller than that of a single California senate district. J.A. 43. Vermont's House districts, the second smallest in the nation, average 4,000 people in a single-member district, and 8,000 people in a two member-district. J.A. 28, 41-42. In 1998, the average number of votes received by winning candidates in a single-member House district was only 1,022. J.A. 42. Vermont's Senate districts are correspondingly small, with about 19,600 constituents per senator. *Id.*

The small population of these electoral districts means that voters expect low-cost campaign methods and direct contact with candidates. P.A. 44a & n.22; Trs. III:29; V:39-40; VII:17; IX:134; X:185; Exs. IV:1348, 1437; V:1826; J.A. 41 (all discussing door-to-door campaigning). Witnesses for both Plaintiffs and Defendants described effective, inexpensive methods of campaigning commonly used in Vermont, including: debates, Trs. I:59-60; II:200-01; literature drops and booths at fairs, Trs. I:61; II:195-95; Ex. IV:1348, 1437; spaghetti or church suppers and barbecues, Tr. IX:134-35, 220-21; sign-waving and supermarket visits, Tr. IX:134-35; public

access or cable TV ads, Trs. IV:49-51; IX:134-35; press releases to obtain free media coverage, Tr. I:61; website and e-mail, and distribution of candidate's biography and position statements through the Secretary of State's website, Tr. IV:57-58, *see also* P.A. 44a; J.A. 31. Indeed, few candidates hire paid campaign staff or advertise on television, and, even when used, television ad costs in Vermont are relatively low. P.A. 44a; J.A. 24-30 (admitting same); J.A. 41; Trs. VII:16-17; IX:49, Ex. VII:2699.

The district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont, calling those claims "wholly unreasonable." P.A. 40a, 43a. The court found that "[t]he majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow." P.A. 43a.

For legislative races, data analyzed by the State's expert and relied upon by the court revealed that average spending for House seats was almost uniformly below the levels set in the new statute. P.A. 39a-40a, 57a; J.A. 88. In the two-member, three-member and six-member Senate districts, candidates under-spent the limits applicable to these districts by amounts ranging from $590 to $7,120. Only in single-member Senate districts did average spending exceed the new limits. J.A. 87.

Voluminous trial evidence also supported Act 64's contribution limits. Both the culture and economy of Vermont led the district court to conclude that even small donations are strong acts of political support. P.A. 41a-42a. It found that the law's contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public." P.A. 59a (citing testimony of seven witnesses, including three of the Plaintiffs). The court determined that Act 64's contribution limits would have affected fewer than 10% of

all contributions made over the three preceding election cycles. P.A. 57a.

After evaluating the trial testimony, the court further found that "the more credible evidence shows that [effective] campaigns would indeed be possible" under the contribution limits set by Act 64. P.A. 40a-41a & n.20 (citing testimony of "candidates, campaign managers, and past and present government officials"). Analysis of the one race that had been held at the time under Act 64 confirmed that finding. P.A. 41a, 58a (Burlington mayoral candidates raised large sums and ran effective campaigns under $200 contribution limit). Finally, the court found that Act 64's limits compared favorably to those that had been upheld in the larger and more populous states of Missouri, Maine and Florida. P.A. 57a-58a & n.24.

The court rejected the contention that the spending and contribution limits of Act 64 would advantage incumbents. Evidence established both that the prior campaign finance system had entrenched incumbents, Trs. VII:148; X:33; 48; Exs. II:525, 529; V:1692, 1694, and that Act 64 would increase electoral competition, Trs. V:52, 148; VIII:56; IX:131-32; X:161.

Ultimately, the district court upheld nearly all of the contribution limits of Act 64.[7] P.A. 24a-25a. Regarding the expenditure provisions, the court found that they were supported by compelling interests and were set at appropriate levels for Vermont. P.A. 66a. It noted: "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* The court refused to sanction the limits, based only on its view that all spending caps were prohibited by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). P.A. 66a.

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[7] The court invalidated Act 64's limits on out-of-state contributions and held that the limits on political party contributions to candidates were too low. P.A. 67a-68a, 76a.

B. After carefully and independently reviewing the full trial court record, the court of appeals upheld the lion's share of Act 64. P.A. 111a, 125a, 144a, 188a-89a.

1. Over a dissent, the Second Circuit held that *Buckley* was not a *per se* bar to consideration of spending limits. It concluded that two compelling interests supported Act 64's expenditure limits. First, the court ruled that Vermont has a compelling interest in safeguarding the political process from the corruption and the appearance of corruption created by unfettered campaign spending and the contributor-dominated system that results from it. Given an unlimited desire for funds, large contributors and special interests with access to significant sources of contributions, are allotted "greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns." P.A. 134a. This reliance often causes officials to adopt positions, set agendas, or take other actions either to secure funding or to ensure continued favor with past donors. P.A. 130a-31a. It further makes it especially hard for officials to take positions that would cut them off from large sources of campaign monies. P.A. 131a-33a.

The court found that Vermonters rightly perceive that "the attention of their public representatives may be available for a price." P.A. 129a. Such a practice, "is pernicious because it is bought," and it "exacerbat[es] cynicism and weaken[s] the legitimacy of government power." P.A. 134a. Act 64's spending limits, the court ruled, directly further the goals of deterring such corruption, ensuring accessibility and accountability of officials, and protecting the public's faith in the integrity of government. P.A. 134a-35a, 144a n.18, 149a-50a.

Second, the Second Circuit determined that Act 64's spending limits were additionally supported by Vermont's compelling interest in protecting candidates' and officials'

time.[8] The court ruled that the demands of seeking campaign dollars often force officials and candidates to engage in fundraising rather than attending to their public duties or interacting with voters. P.A.135a. "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office." P.A. 139a; *see* P.A. 144a. This pressure to raise funds not only diverts officials from the public's work, it narrows the scope of the views and information they and candidates receive because their available time is consumed by donor groups with their own agendas. P.A. 140a.

The Second Circuit further concluded that the expenditure limits were set at levels that directly advanced the above compelling interests while permitting effective campaign advocacy. P.A. 148a-57a. It ruled that Plaintiffs' emphasis on certain high-spending races provided no basis to overturn the law. P.A. 156a. "[A]mple evidence" established that effective campaigns could be run under Act 64. *Id.* Nonetheless, the Second Circuit remanded for additional narrow tailoring analysis regarding other possible regulatory options and whether higher expenditure limits might equally serve the identified compelling interests. P.A. 157a-158a.

2. The Second Circuit unanimously upheld virtually all of Act 64's contribution limits, including the party contribution limit invalidated by the lower court. P.A. 168a-170a, 177a-78a, 183a-84a (rejecting only Act 64's out-of-state contribution limit). The court concluded that those limits deter the "real and perceived threat of corruption in Vermont," and are closely drawn to ensure effective campaigns. P.A. 171a-72a. The court also upheld the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a). P.A. 183a.[9]

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[8] The State asserted five compelling interests, only two of which were examined by the court below. P.A. 127a, 145a.

[9] The court also remanded three matters that are not presently before this Court, including the constitutionality of treating related

SUMMARY OF THE ARGUMENT

Vermont enacted spending limits because the never-ending desire for campaign money had distorted the political process and undermined public faith in those who govern. Even with contribution limits in place, candidates and officials still devote great time and resources to courting industries or special interest groups with access to large blocks of contributions. As the record here convincingly shows, the resulting close ties among such donor groups, candidates and elected officials often determine what positions candidates and officials take on issues, which matters are given legislative priority, who gets access to candidates and officials, and where candidates and officials spend their time. This type of influence and access is "pernicious because it is bought." P.A. 134a.

The Vermont Legislature carefully crafted Act 64 to address these grave concerns and carry out the State's prime duties of ensuring the integrity of its political processes and maintaining citizen confidence in government. While this Court invalidated federal spending limits in *Buckley*, the same result does not follow here. In contrast to *Buckley*, the instant record establishes that spending limits directly further the compelling interests of deterring corruption and its appearance, and of protecting the time of officials and candidates from limitless fundraising. Expenditure limits militate against the undue access and influence now afforded donors and allow officials to decide issues based on the merits, not the wishes of their financiers. They permit officials to attend to their public duties instead of seeking private dollars, and assure that candidates and officials have the opportunity to hear the views of all citizens, regardless of whether they are donors. Act 64's spending limits are specifically targeted to further such compelling interests and are set at levels sufficient to allow vital and effective campaigning. Indeed, between 1994 and 1998,

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expenditures as candidate expenditures and of limiting transfers between state and national parties. P.A. 168a, 180a-81a.

the vast majority of candidates spent at or below the levels set by Act 64. As such, the limits are narrowly tailored.

While such weighty interests and tailoring satisfy *Buckley's* exacting scrutiny, should the Court disagree, the State asks that the Court revisit the constitutional standard for spending limits set out in *Buckley*. That case did not fully consider that critical constitutional interests, including some going to the very core of our form of government, lie on both sides of this issue. Balancing of those interests, as the Court has done in other contexts, leads to the conclusion that Act 64's spending limits are constitutional.

Plaintiffs' challenge to Act 64's contribution limits does not withstand inquiry. The Court has frequently found that such limits serve the critical interests of reducing actual and perceived political corruption. The record here confirms those judgments and details numerous instances where contributors received or were perceived to have received undue access to and influence over officials. Such access and influence impacted government policy and reinforced the public's perception that "big money" controls what happens at the state capital. To address those concerns, Act 64's contribution limits are directed at amounts considered "suspiciously large" and would have affected fewer than 10% of the contributions made between 1994 and 1998. The limits permit both meaningful contributions and effective campaigns at all levels. They are fully constitutional.

Act 64's limits on contributions by political parties to candidates are equally valid. They, too, deter real and apparent corruption and also avoid evasion of Act 64's other limits. Parties are not constitutionally entitled to higher contribution limits than other donors. Act 64 allows parties to make meaningful contributions to candidates, and they remain free to engage in unlimited independent spending to support candidates or engage in traditional party building activities, such as get-out-the-vote efforts.

Plaintiffs' argument against the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a), misconstrues the law's treatment of coordinated expenditures. Act 64 places no limit on independent spending. Section 2809(d) establishes only a non-conclusive, evidentiary presumption for a narrow category of expenditures most likely to have been coordinated with a candidate. Under Vermont law, such a presumption arises only at trial and shifts just the initial burden of production, not the burden of persuasion. It does not require candidates or parties to disassociate themselves from a communication or take any action whatsoever. It imposes no burden of constitutional magnitude and does not chill speech.

ARGUMENT

I. Act 64's Spending Limits Are Constitutional

Vermont's spending limits pass the exacting scrutiny set out in *Buckley*. 424 U.S. at 44.[10] They directly further the critical interests of deterring corruption and its appearance, thereby fulfilling the State's core duties of ensuring the integrity of Vermont's electoral process and restoring public confidence in government. Expenditure limits additionally serve the equally compelling interest of assuring that candidates and officeholders devote less time to fundraising and more time to interacting with constituents and attending to their duties. Vermont's nine decades of experiments with campaign

[10] Any suggestion that *Buckley* precludes such analysis is unfounded. *Buckley* rejected spending caps based only on the summary judgment record before it and the implicit prediction that contribution limits and disclosure would work to end corruption. The contrary record here establishes that spending limits are necessary to address corruption and its perception in elective politics. Likewise, *Buckley* did not even consider, much less reject, the time protection interest as a basis for upholding spending limits. 424 U.S. at 55-57. Respondents VPIRG, *et al.*, fully discuss why *Buckley* does not bar consideration of spending limits or the asserted compelling interests, and the State adopts that argument.

disclosure laws, contribution limits, and voluntary expenditure limits, P.A. 26a-27a, combined with the record created below, demonstrate how compelling these interests are and fully justify the particular levels of spending caps set by the Legislature to safeguard Vermont's system of government.[11]

A. States Have Unique Duties To Protect Their Electoral Systems And Maintain Citizen Faith In Government

This Court has often recognized the special responsibility a state has to "preserv[e] the integrity of its election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(quotation omitted); *see Gregory v. Ashcroft*, 501 U.S. 452, 461-63 (1991); *Oregon v. Mitchell*, 400 U.S. 112, 125-26 (1970)(opinion of Black, J.). "Preserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978)(quotation omitted).

The importance of protecting states' representative structures and their ability to determine and police the methods

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[11] Judge Winter's dissent incorrectly relies upon nonrecord evidence to argue against Act 64. *See, e.g.*, P.A. 238a; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986)(court "must affirm or reverse upon the case as it appears in the record"). Indeed, the dissent illustrates the perils of relying on such evidence, which the parties have had no opportunity to explain or contest. For example, the suggestion that voter turnout in the 2000 election was "perhaps...record breaking," P.A. 278a, is mistaken for several reasons: (1) 2000 was a presidential election year, which has higher turnout; (2) there were more eligible voters in 2000; and (3) voter turnout in 2000 *as a percentage of Vermont's voting age population* was lower than in some previous presidential election years. *See* Vermont Elections Data, *at* http://vermont-elections.org/elections 1/1974to2004RegPop.html. Nonrecord evidence of this sort is not appropriate for judicial notice under Fed. R. Evid. 201.

of electing their own officials is enshrined in the Constitution itself. U.S. Const. art. I, §§2, 4; art. IV, §4; amend. X; *see Gregory*, 501 U.S. at 463; *Storer v. Brown*, 415 U.S. 724, 730 (1974). And, Vermont's Constitution specifically assures Vermont citizens that they shall have an equal ability to vote, run for office and have equal access to members of the Legislature, and that elections shall be "free and without corruption." Vt. Const. ch. I, art. 8; ch. II, §8 (Statehouse "open for the admission of all persons").

Indeed, avoiding corruption and the appearance of corruption in government and elections is "critical...if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000); *Bellotti*, 435 U.S. at 787 (1978)(state interest in "preventing diminution of the citizen's confidence in government"). Act 64's spending caps directly further the State's paramount duties of preventing real and perceived corruption and restoring public confidence in the electoral system.

B. Vermont's Spending Limits Deter Real And Apparent Corruption

While contribution limits are assuredly an essential weapon against political corruption, *see infra* Section III, they do not address all its manifestations. As Vermont's experience shows, without spending limits candidates constantly fear that their opponents may outspend them, and they are forced to seek larger and larger campaign war chests. Tr. VIII:57; *see also* Trs. V:32-33; VII:75-78; IX:133-34. In such an "arms race" for funds, special interests exert undue influence upon lawmakers. P.A. 134a. Whether through bundling or grouping of donations from multiple members of an industry or group, or otherwise, special interests remain major funding sources for candidates. Exs. I:218-19; III:0783; I:196 ("[if] all the money that came into

me ... were people that I could identify were teachers, I would know I'm in the NEA's pocket"); Tr. VIII:192-94 (in small state a single interest can exert significant pressure through organized giving).

What the special interests receive in return are access to and untoward influence over candidates and officials. As the district court stated, the system of unlimited spending makes it very difficult for officials to take positions adverse to their funding sources, even if the officials disagree with them. P.A. 37a-38a. Spending limits reduce the candidates' need for funds thereby relieving the pressure to afford special interest groups undue access and influence based solely upon their financial strength. Trs. IX:195-96; VII:88.

The record is punctuated by revealing testimony describing the preferential access and influence accorded special interests due to their ability to generate campaign funds. Senate President Shumlin confessed that special interests obtain access on that basis: "I guarantee you it happens." Ex. I:297; *see also* Exs. I:341 (senator acknowledged undue influence of money from "Wall Street, the banking industry, the insurance industry, the pharmaceutical industry"); II:505 (fundraising and lobbying "completely linked"); I:375 (Monsanto spending coincided with legislative consideration of milk labeling bill); III:902 (Governor confessed "money does buy access"). Peter Smith, former holder of numerous state offices, explained that politicians "will spend a different kind of time and a different kind of attention" on those who control large blocks of contributions. Tr. VIII:24.

With an unlimited desire for funds, officials are forced to keep one set of eyes on the merits of an issue and another on their pocketbooks. Indeed, before taking a stance on a piece of legislation, legislators typically ask, "what's the industry's position, what's the union position...what does the money want?" Tr. VIII:24-25. Citizens appreciate all too well the situation. Sen. Ready testified that people think "'the big

money controls everybody in Montpelier....' They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." Tr. IX:119.

As Lt. Governor, Smith observed first-hand how the fear of losing several contributors at once has the potential to sway legislative action. Tr. VIII:39-41. He was called upon to cast the tie-breaking vote concerning whether optometrists, as well as ophthalmologists, would be allowed to administer eye drops. "There were lobbyists and individual doctors...all over the statehouse." Tr. VIII:41. It became clear to him that these groups were banking on the power they could obtain through campaign contributions: "the merits of the case were, if you will, infused...by the financial power of the groups and the individuals who were contesting the bill." Tr. VIII:42.

The record is replete with examples of groups asserting their financial strength to gain access to officials and exert undue influence on governmental outcomes. Democratic Party leaders reminded Legislators that they risked being "shut off in the next election cycle from any contributions" from pharmaceutical interests unless they voted consistent with the industry's views. Tr. VII:66; Ex. V:1763-64 (summary of pharmaceutical contributions). Likewise, the Senate President refused to support a bill requiring labeling of genetically-engineered food because he feared loss of the financial support of food manufacturers. Tr. VII:67-71. He stated: "We've already lost the drug money, and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." Tr. VII:70; P.A. 131a; *see also* Trs. VIII:47-48 (NRA use of fundraising ability to attempt to influence officials' position); IX:104-07, 110-11, 175; Exs. II:425-26; V:1766 (all noting beverage industry contributions as significant in preventing expansion of bottle redemption bill); V:55-56 (tobacco industry contributions handed out after defeat of tobacco bill). When a candidate does not know how much her opponent may raise, it is much harder to turn down such compromising donations.

Similarly, several trial witnesses described contributions by slate quarries to members of a legislative study panel that was considering a regulatory exemption for the quarries. Contrary to the usual practice, the Senate President appointed panelists who were not members of the Natural Resources Committee -- the committee that had jurisdiction over this topic. The President and members of the study committee received contributions of $500 each from the slate industry. Tr. IX:92-94; Ex. V:1765. When the quarries were exempted from regulation, neighbors perceived that the money and power of the quarries had drowned out citizens' voices. Trs. IX:103-04 ("they felt powerless"); VII:63-65; Exs. III:785 ("hard to top this [incident] for blindness to appearances and propriety"); III:787.

Even if the preferential access and influence of special interests results in no tangible benefits to the contributors, "it certainly [gives] the 'appearance of such influence.'" *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado II*)). And those perceptions directly undermine the public's faith in government. As Sen. Rivers testified:

> Sometimes I have difficulty getting people to agree to register to vote, and they say, you know, in the end, money decides everything. My vote doesn't matter.

Tr. VII:65; *see* Tr. IX:119 ("People don't believe their vote counts.").[12]

Indeed, witnesses for both sides "acknowledged the deterioration of public confidence" in Vermont. P.A. 36a-37a; *see* Trs. IX:57-58 (voters believe that high spending campaigns reflect candidates running for special interests); IX:129-30

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[12] Encouraging citizens to vote is "an essential state objective: for the constitutional order must be preserved by a strong, participatory democratic process." *California Democratic Party v. Jones*, 530 U.S 567, 587 (2000)(Kennedy, J., concurring).

(with unlimited campaign spending, average citizens do not feel like "players"); V:114-15 (constituents feel powerless); X:186-87; Exs. II:482-83 (money is distancing people from government); III:847-48 (survey showed Vermonters extremely concerned about influence of special interests, as compared with ordinary citizens); Trs. V:55-56; VII:62-63; X:180; Ex. III:806-09 (all noting perception of impropriety from tobacco industry donations).

The access and influence of special interests described above is corrupt "because it is bought." P.A. 134a. Plaintiffs' suggestion that it does not fall within the Court's definition of "corruption" is totally at odds with precedent. *McConnell* judged the concern that officials would make decisions based "not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions" to be "[j]ust as troubling...as classic *quid pro quo* corruption." 540 U.S. at 153. Even if those decisions "occur only occasionally, the potential for such undue influence is manifest." *Id.*

Corruption thus extends beyond clumsy, money-for-vote chicanery, to "more subtle yet equally dispiriting forms of corruption," *id.*, that threaten the integrity of the political process. Such corruption includes the use of donations to "gain access to high government officials," *id.* at 150, and extends to "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *see McConnell*, 540 U.S. at 150; *Colorado II*, 533 U.S. at 441 (corruption includes "undue influence on an officeholder's judgment"); *Buckley*, 424 U.S. at 27, 29-30, 45 & 67 (corruption concerns "improper influence" or "groups desiring to buy influence" or "post-election special favors that may be given in return" for generous support).

The public's perception of such political corruption is also of great constitutional concern. *Shrink*, 528 U.S. at 388-89 (citing *Buckley*, 424 U.S. at 26 and *Letter Carriers*, 413 U.S. at

565). As the Court stated in *FEC v. Nat'l Right to Work Comm.* (*"NRWC"*), the suggestion of such corruption "directly implicate[s] the integrity of our electoral process." 459 U.S. 197, 208 (1982)(quotation omitted). Since Act 64's spending limits directly counter political corruption and its appearance, they further interests of the highest order.

C. Vermont's Spending Limits Protect The Time Of Officials And Candidates

Act 64's spending limits are also supported by a second compelling justification: protecting candidates' and officials' time from the demands of excessive fundraising. Both lower courts correctly determined that the need for unlimited campaign money often forces officials away from their governmental duties and pressures them and all candidates to allot their limited available time to donors rather than constituents. This not only results in preferential access to monied interests and less effective governing, it also limits the scope of the views and perspectives heard by officials and candidates. J.A. 20-21 (Findings (a)(1), (a)(4), (a)(8)).

Members of this Court have noted the compelling nature of the interest in freeing officeholders and candidates from the stranglehold of fundraising. While *Buckley* merely mentioned that interest in connection with upholding the public financing portion of the Federal Elections Campaign Act ("FECA"), 424 U.S. at 96, Justice Kennedy has suggested the possibility of "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting); *see Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996)(Stevens & Ginsburg, JJ., dissenting) ("*Colorado I*").[13]

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[13] Courts of appeals have also found the time protection interest to be compelling. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

The vital governmental interests in diminishing distractions to officeholders, enabling candidates to engage with voters in mutual communication, and encouraging officials to be mindful of and responsive to the broad array of citizens -- not to a select few -- are enshrined in the Vermont Constitution itself. It declares that all power is "originally inherent in and co[n]sequently derived from the people, therefore, all officers of government...are their trustees and servants; and at all times, in a legal way, accountable to them." Vt. Const. ch. I, art. 6. It further provides that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community...." Vt. Const. ch. I, art. 7. The critical importance of such concerns cannot validly be challenged.

The legislative and district court records here provide ample evidence supporting the interest in time protection. Given the desire for increasing amounts of campaign funds, officials are continually forced to choose between attending to their duties and shoring up financial support. All too often, the official duties lose out. As the Senate President testified to one committee:

> I can't tell you how many times I'm walking down this hall and someone grabs me [ ] and says, could you meet with so and so, and I know that preferably my answer would be no, I have other work to do, but I also have to think about [elections in] '98.

Ex. I:291; *see* J.A. 21-22 (Finding (a)(11)); Exs. I:92 (law will allow candidates "to concentrate more on issues rather than raising public money"); I:326, 358 (similar); III:793 ("distraction of fundraising" caused Governor to focus on large fundraisers).

Fearing their opponents' war chests and concerned about being outspent, Trs. V:51; VIII:57-58; Ex. I:233, candidates and

officials typically grant monied interests excessive portions of their limited time. As a veteran official stated, the further one progresses politically, the more time one spends raising money and paying attention to big money contributors. Tr.VIII:19, 23-24; *see* Ex. V:1845 (more likely to spend time with large funding sources). If officials have only an hour to respond to telephone calls, donors will get their calls returned. Trs. V:29-30; IX:166-67; Ex. III:781. In short, the unbridled need for campaign cash compels candidates and officials to afford greater and greater amounts of their time to their funding sources. J.A. 20 (Finding (a)(2)).

When officials and candidates spend time "talking to large contributors, they are not talking to others." Trs. IX:194; *see* IX:128-29 (fundraising keeps officials "locked away" and not "out with the public"). The information and perspectives they hear on issues are primarily those of the narrow interests that provide them monetary support. Consequently, concerns of the wealthy "dominate[ ] the political process to the exclusion of the voices and ideals and aspirations of poor and working class and middle class people." Tr. V:170; *see* Tr. V:116 (officials develop relations with those who have money not ideas); Tr. VII:59-60 (large sponsors of senate fundraisers include major drug companies); Tr. IX:113, 116-17. This directly affects candidates' and officials' views on the issues and distorts the representative nature of democracy.

Under a system of unlimited spending, the important views of Vermonters whose money must go to mortgage payments and heating bills often go unheard. Ex. V:1845-46; Tr. IX:104; *see also* Tr. V:130, 143; Ex. V:1838 (all noting value of hearing views of constituents). The "collective discussion and debate" among elected officials and citizens that the Framers viewed as a cornerstone of our republican form of government is thereby tilted in favor of monied interests. Cass Sunstein, *The Republican Civic Tradition:*

Beyond the Republican Revival, 97 Yale L.J. 1539, 1549, 1576-78 (1988). This makes officeholders accountable to money, not to the citizens of Vermont.

By releasing candidates from the pressure to raise limitless sums, Act 64 restores balance to that "discussion and debate," permits officials to attend to the people's duties, and "improve[s] the health of the democratic system." P.A. 59a; *see* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All,* 94 Colum. L. Rev. 1281, 1298 (1994)(reducing fundraising time enhances "quality of representation"). Such interests are undoubtedly compelling.

D. Vermont's Spending Limits Do Not Favor Incumbents

Plaintiffs' contention that Vermont's spending caps unfairly discriminate against challengers and non-traditional candidates is meritless. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S. at 31, 33; *Shrink*, 528 U.S. at 389 n.4 (rejecting notion that contribution limits applicable to all favor incumbents).[14] No proof of intentional discrimination exists here. Just the opposite.

Many people supported Act 64 because they believed it would increase the number and diversity of challengers. Ex. II:649; Tr. VII:148; *see* Exs. I:376-77 (Governor's Commission on Women urged campaign reform, noting that then-existing system "favors the wealthy, the incumbent and the white males"); I:92 (Act 64 permits greater accountability of incumbents and improves challengers' chances); Tr. VII:86 (Act 64 does not disadvantage non-traditional candidates).

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[14] *Shrink* described this as an equal protection argument. Plaintiffs' amended complaints allege no such claim.

Most importantly, it is incumbents who benefited most from the system in place prior to Act 64. Tr. X:19 ("old law was the best incumbency protection money could buy"); *see* Ex. III:1057-58 (noting high re-election rate of incumbents). Incumbents typically have greater access to large, monied interests, can generate large war chests that dissuade potential candidates from mounting challenges, and can outspend opponents. Trs. IV:12; VI:94-95; IX:127, 231; X:33; *see* 424 U.S. at 32. As a result of those advantages, incumbents were often uncontested in Vermont. Tr. X:33; Ex. V:1694. Spending caps work directly *against* incumbents by diminishing such impediments to competition. Trs. VII:79; IX:144-45.

Contrary to Plaintiffs' assertions, challengers need not outspend incumbents to win. Evidence below showed that challengers can be competitive so long as they are not greatly outspent by incumbents. Tr. X:82-84. Since Act 64 specifically grants non-incumbents the ability to outspend incumbents, challengers are given a significant advantage. 17 V.S.A. §2805a(c)(P.A. 7a); P.A. 151a. Plaintiffs submitted no evidence supporting a claim of invidious discrimination against non-incumbents; their arguments were and still are entirely "speculative." P.A. 60a, 151a-52a.

E. Vermont's Spending Limits Are Narrowly Tailored

The Second Circuit's complex, multi-step tailoring analysis and its remand to examine alternatives and possibly fine tune the spending levels are unnecessary. The record here fully supports the conclusion that Act 64's spending limits are a narrowly tailored means of protecting the integrity of Vermont's electoral system.[15]

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[15] The dissent below and the Randall Plaintiffs, Br. at 4-5, exaggerate the scope of the term "expenditure" to support their assertions. 17 V.S.A. §2801(3)(P.A. 1a). Since Plaintiffs did not challenge that definition as overbroad or vague in their complaints, the lower courts did not have the benefit of the State's authoritative construction of the

Since 1916, Vermont has sought effective methods for deterring actual and apparent political corruption. P.A. 26a-27a. Disclosure laws, contribution limits and voluntary spending caps did not, on their own or in concert, totally ameliorate those dangers. Vermont has, thus, examined and employed feasible alternatives to spending limits and found them wanting.[16] J.A. 20-21 (Findings (a)(2), (a)(3), (a)(9)).

Likewise, the Second Circuit's remand to determine whether higher spending limits would be as effective as those of Act 64 is unworkable because it assumes that there is a single dollar amount that will satisfy the Constitution. It leads to the hopeless task of trying to decide whether a limit $1,000 higher would be as effective as the chosen limits at combating corruption and its perception and at protecting candidates' and officials' time. P.A. 162a. Such meticulousness has not been demanded by this Court to satisfy narrow tailoring and would amount to a virtual "straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecom.*

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term. While Plaintiffs would have the Court believe that "expenditure" might include virtually all conduct, the State has not construed it so expansively. For example, expenses of litigating issues under Section 2809(e) are not expenditures, for they are not (as the statute requires) "paid...for the purpose of influencing an election." Similarly, the State does not interpret traditional volunteer activity to fall within the definition of expenditure.

[16] Some of the alternatives suggested by Plaintiffs and their *amici* already exist in Vermont, yet corruption and time concerns remain. *See, e.g.*, 2 V.S.A. §266 (prohibition on accepting campaign contributions from lobbyists during session); and House and Senate Rules, Part III, Rule 10, *at* http://www.leg.state.vt.us/misc/rules2.htm (members are to be present for all sessions and committee meetings). Similarly, VRSC's suggestion, Br. at 43-44, that officials hire staff to perform their duties while they fundraise, only guarantees that elected officials will spend even more time neglecting their duties. It would also undermine the citizen legislature that Vermont sought to preserve through Act 64, Ex. I:294, and would do nothing to deter corruption.

Consortium v. FCC, 518 U.S. 727, 741 (1996); *see Burson*, 504 U.S. at 209 (rejecting notion that state must "perfectly tailor[ ]" size of picket-free zone); *see also McConnell*, 540 U.S. at 208 (tailoring should permit government to address problem "most acute to the legislative mind").

While the Court has not fully defined the scope of tailoring in the expenditure limits context, Act 64's limits are "precisely targeted to eliminate" the evils that justified the law. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). Further, as the record convincingly establishes, they permit lively and effective campaigning at all levels. P.A. 43a-44a, 152a-57a. As such, they are sufficiently tailored.[17]

II. Alternative Constitutional Analyses Support Vermont's Spending Limits

The State believes that Act 64's campaign expenditure limits survive the exacting scrutiny set out in *Buckley*. If not, then the Court should revisit *Buckley* and consider alternative constitutional approaches to spending limits. Specifically, where two or more constitutional interests are in conflict, a long line of this Court's decisions has counseled in favor of balancing those concerns to determine which should take precedence under the circumstances presented. *See Shrink*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring)(collecting cases); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991)(balancing fair trial rights against First Amendment interests); *Republican Party v. White*, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring)(First Amendment right can give way to avoid "impairment of some other constitutional right"). Under such an analysis, the expenditure caps of Act 64 are constitutional.[18]

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[17] The State adopts the full discussion of tailoring contained in the brief of Respondents VPIRG, *et al.*

[18] While such balancing may be performed consistent with *Buckley*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring), it also stands alone as a basis for upholding spending restrictions.

Spending limits advance constitutional concerns that go to the very structure of government. As argued above, states have a constitutional imperative to ensure the integrity of their electoral processes. *McConnell*, 540 U.S. at 137. Where, as in this case, the Legislature has evidence that unfettered spending has corrupted its governmental system, it must be able to take reasonable protective action. In *Burson v. Freeman*, for example, the Court balanced the harm to the electoral process presented by the appearance of placards at polling places against the First Amendment right of persons to express their views through such signs. The Court determined that the minimal intrusion on the latter's interest was more than justified by the necessity of ensuring the integrity of the electoral process. 504 U.S. at 198-211; *see Letter Carriers*, 413 U.S. at 565-67 (upholding Hatch Act because citizens must have faith that government actors are unbiased); *Elrod v. Burns*, 427 U.S. 347, 368 (1976) ("Preservation of the democratic process is certainly an interest protection of which may in some circumstances justify limitations on First Amendment freedoms.") (plurality opinion).

Indeed, even before the First Amendment was drafted, the Constitution assured to all citizens a republican form of government. U.S. Const. art. I; art. IV, §4. The United States and Vermont fulfill those guarantees by locating ultimate power with the citizens who then elect officials to represent their interests.[19] *See Largess v. SJC*, 373 F.3d 219, 227 (1st Cir. 2004); Federalist Nos. 37 & 39 (under republican government all power derived from the people). As this record shows, however, the race for funds sometimes pressures officials to make decisions based on their own sense of obligation to past funding sources or their own need for future campaign monies.

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[19] The Framers believed that such "representation and jury trial were dual securities for the first great class of personal rights." Jack Rakove, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996).

McConnell, 540 U.S. at 153. Such a result undermines a core component of democracy and creates a government that is not "open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The admittedly weighty First Amendment interests of candidates do not surpass the constitutional interests described above. Candidates choose to enter politics and ought to abide by appropriate rules and regulations established to protect the fairness and integrity of that system. Act 64 imposes a reasonable limitation on the amount a candidate may spend in that setting.[20] Since effective and vibrant campaigns can be run under Act 64's limits, any burden on candidate speech is not severe.[21] Balanced against the significant constitutional interests directly furthered by spending limits, those restrictions are more than justified. As Learned Hand stated in another context, the "gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (2nd Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Constitutional restraints must be flexible enough to allow states to serve as "laboratories" to experiment with balancing such concerns, as Vermont has done with Act 64. *See, e.g., Whalen v. Roe*, 429

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[20] Prior to *Buckley*, numerous states and localities had long functioned with spending limits. Internationally, many democracies, including Canada and England, also adhere to such limits. Roland Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, 147 (1996).

[21] In fact, Act 64's spending limits will likely *enhance* First Amendment interests by improving candidate-voter interaction; increasing issue-based campaigns; fostering citizen interest in campaigns; and boosting the number of competitive races. *See Colorado I*, 518 U.S. at 649-50 (Stevens & Ginsburg, JJ., dissenting).

U.S. 589, 597 (1977); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995)(Kennedy, J., concurring); J.A. 109.[22]

III. Vermont's Limits On Political Contributions Are Constitutional

Vermont's contribution limits are in keeping with recent and familiar Court precedent. In an unbroken string of decisions, this Court has consistently upheld the validity of laws limiting contributions to candidates because they directly serve the vital interests of deterring corruption and the appearance of corruption in politics. *See McConnell*, 540 U.S. at 137-38 & n.40 (collecting cases and noting strong *stare decisis* implications from the Court's contribution limits jurisprudence). Because of the "limited burdens they impose on First Amendment freedoms," *id.* at 136, contribution limits are not subject to full exacting scrutiny review, and legislative determinations concerning the need for particular limits are entitled to substantial deference. *Id.* at 137; *Shrink*, 528 U.S. at 386-88; 424 U.S. at 21. Even a contribution limit "involving 'significant interference' with associational rights, could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tun[ed].'" *Shrink*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 134-37.

The record here easily satisfies that standard and shows that Act 64's limits directly advance critical interests and permit fully effective campaigning.

A. Vermont's Contribution Limits Deter Actual And Perceived Corruption

1. While the instant record contains abundant proof that, even with its prior contribution caps, campaign donations had

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[22] The State adopts those portions of the brief of Respondents VPIRG, *et al.*, suggesting alternative compelling interests and constitutional approaches supporting spending limits.

fostered the reality and appearance of corruption in Vermont, the quantum of proof necessary to validate such justifications is not exacting. The *Shrink* Court flatly rejected a line of cases from the Eighth Circuit, still cited by the Plaintiffs, *see, e.g.*, VRSC Br. at 12, that had required exhaustive proof of actual corruption or its perception before contribution limits would be upheld. This Court ruled, instead, that the findings made in the course of the *Buckley* litigation are themselves sufficient to establish that legislative concerns about corruption and the appearance of corruption stemming from large contributions are not "'illusory.'" *Shrink*, 528 U.S. at 391 (quoting *Buckley*, 424 U.S. at 27); *see McConnell*, 540 U.S. at 117 (noting congressional statements bemoaning "the pernicious influence of large campaign contributions"). The Court concluded that there "is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Shrink*, 528 U.S. at 395; *see NRWC*, 459 U.S. at 210 (court has no basis to "second guess" congressional judgments "where corruption is the evil feared").

Just so here. Following *Shrink*, it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded. *Shrink*, 528 U.S. 391 & n.5 (collecting cases noting link between contributions and corruption).

Plaintiffs' further contention that the Constitution requires exhaustive and Vermont-centered instances of corruption linked directly to specific contribution levels, *see* VRSC Br. at 10-12, is belied by this Court's precedents. *Buckley*, *Shrink* and *McConnell* did not demand proof that there had been corruption or the fear of corruption "just above" the specific levels of the contribution limits being reviewed. *Buckley* rejected the very argument echoed by Plaintiffs here that only much higher contributions would tempt politicians to risk their careers. 424 U.S. at 30; VRSC Br. at 11-12. In its place, the Court accepted

evidence that, as a general matter, large contributions had either corrupted the political process or created a public impression of such corruption. Since contribution limits directly address those concerns, they were rightly found to further significant governmental interests.

More importantly, Plaintiffs' approach would require states to suffer injury before taking steps to protect their political processes and would impose an impossible evidentiary burden. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Under Plaintiffs' misguided view, in the absence of actual proof of corruption at a specific level of contribution, a state could not act prophylactically to guard against campaign abuses. That is not the law. It is "*the potential for* such influence that demands regulation." *NRWC*, 459 U.S. at 210 (emphasis added); *Shrink*, 528 U.S. at 393-94 nn.5-6. Moreover, a contrary rule would subject states to "endless court battles over sufficiency of the evidence" of corruption. *Munro*, 479 U.S. at 195 (quotation omitted).[23]

2. While Vermont might have justifiably passed Act 64 solely as a preventative measure,[24] unfortunately, it did not. The legislative history of Act 64 and the record before the district court provide significant examples of corruption and the appearance of corruption stemming from contributions in Vermont -- all of which arose despite Vermont's prior, $2,000, contribution limits.[25] Such evidence more than meets any

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[23] Plaintiffs' mistaken approach would also force the State to justify the particular amounts of its contribution limits under both prongs of the *Buckley/Shrink* framework. Instead, contribution levels are rightly examined in the tailoring portion of that analysis.

[24] Act 64 was designed, in part, to safeguard Vermont from the types of scandals that had occurred elsewhere. Exs. I:197, 272, 291-92, 349-50, 364; II:483-84.

[25] With the household median income in Vermont at $32,358 in 1996, this amounted to more than two-thirds of a household's monthly gross income. Ex. V:1740-41.

requirement that the State adduce Vermont-specific evidence of corruption or its appearance. Contrary to Plaintiffs' arguments, Randall Br. at 42, VRSC Br. at 12-13, in terms of both quality and quantity, the evidence in this case far surpasses that relied upon in *Shrink* to uphold Missouri's contribution limits. 528 U.S. at 393-94.

The Findings and the exhaustive evidence presented to the Legislature provide strong proof of corruption and the appearance of corruption in Vermont politics. The Legislature found that some candidates and officials "respond and give access to contributors who make large contributions in preference to those who make small or no contributions;" that large contributions "reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens;" and that reducing large contributions is necessary to fulfill the guarantee of the Vermont Constitution that "all elections ought to be free and without corruption." J.A. 20-22 (Findings (a)(2), (a)(9) & (b)). These Findings were fully supported by the legislative record. *See supra* Statement of the Case, Section I.B; P.A. 52a.

The documentary and testimonial evidence credited at trial by the district court confirmed the Legislature's concerns. After interrogating many witnesses on its own and closely examining the evidence, the court found that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence" and that large contributions have negatively impacted the public's confidence in the system. P.A. 37a-38a.

The record before the court revealed a political system where donors receive, or were perceived to receive, unequal access to and undue influence over the legislative process and officials solely as a result of their campaign contributions. Sen. Rivers admitted that she gave special consideration to a tax exemption request because the person asking was a large donor.

Tr. VII:2-74. Other officials were equally frank. *See* Tr. IX:167 (Ready: "Not everybody in my district do I have lunch with or...return a call from the floor of the senate before a vote.... [or] meet with on a Saturday morning.... [or] spend half of my son's soccer game talking to about their business. There is definitely different levels of access to elected officials."); Tr. VII:72 (Rivers: "[W]hen I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent."); Ex. V:1845 (Fiorillo: the larger the contribution, the more likely the official will spend time with the donor).

Indeed, access and influence are the prices customarily paid in return for contributions. Tr. VII:72-74 ("typical" for Vermont officials to give special consideration to requests and views of large contributors). As former Secretary of State Don Hooper explained, donors "expect access and consideration.... So in essence at a minimum [a contribution] buys access. On the worst days I suppose it buys influence." Tr. V:58-59; *see* Tr. IX:195-96 (Governor granted meeting to large, corporate contributor while repeatedly denying meeting on same subject to a group of Vermont farmers).

Donors appreciate and wield this financial clout. State Treasurer Paul Ruse was forced to forgo a re-election bid amidst public outcry over his acceptance of significant contributions from financial firms that "may want favors in return." Ex. III:803-04; *see* Ex. III:795-97. Rep. Kitzmiller stated that Ruse's conduct "certainly gave the impression that there was *quid pro quo* of money given to a candidate and business done by the officeholder for the person giving the money." Tr. X:161-62; *see* Trs. IX:92-93, 103-04; Exs. III:785-87; V:1765; *see also* Tr. X:184-85 (contribution while bill pending believed to be connected to vote).

Officials often take full advantage of this culture as well, creating what is all too often a pay-to-play system:

> Q: [D]o the lobbyists have any understanding of the value of attending a fundraiser for a candidate?
>
> A: It's almost mandatory in some -- I am trying to think of what the right thing is. For example, when Speaker Wright started the speaker's soiree, you had needed -- I think if you were a lobbyist during that period in the legislature and you wanted your bill or your hopes that some other bill would be devastated, if you were serious about that, you needed to attend.

Tr. V:30-31; *see* Ex. II:511 (officials aggressively seek monies from lobbyists).

As the district court correctly observed, the citizens' perception of such a regime is unmistakable: it raises an obvious appearance of corruption that impacts public confidence in the integrity of government. P.A. 36a-38a; *see* Trs. IV.183-84; IX:94-95, 108-09, 116-17, 168-69. Incidents like those above, "increase the cynicism on the part of the public...and make it more difficult to convince people that the democracy is alive and well in this country." Tr. VII:65; *see* Tr. V:54 (perceptions of Ruse incident). Even many of Plaintiffs' witnesses agreed. P.A. 36a-37a.[26]

Expert testimony adduced at trial provided additional confirmation of the impact contributions have upon the conduct of officials. The studies and testimony of Professor Thomas Stratmann showed that "large contributions create the appearance of corruption to the public and affect legislators' voting behavior." P.A. 38a; Tr. VII:198; Ex. III:1064. Dr. John Lott, a VRSC expert, admitted that donors will often do what it

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[26] Indeed, in 1998, nearly three quarters of Vermonters polled believed that wealthy individuals and large corporations had too much influence in politics and ordinary voters did not have enough. Ex. III:847-48; *see Shrink*, 528 U.S. at 394 (relying on survey).

takes to obtain preferential government treatment. The "more favors government has to give out, the more resources that people will spend to obtain those favors." P.A. 38a; Tr. III:154-55 202; Ex. VI:2266.

As the Second Circuit rightly concluded, the evidence before the Vermont Legislature and the district court was more than sufficient to justify the need for Act 64's contribution limitations. P.A. 125a.

B. Vermont's Contribution Limits Are Closely Drawn

The great weight of the evidence convincingly establishes that Act 64's contribution limits are appropriately geared to the Vermont political landscape. Citing primarily evidence considered and rejected at trial, Plaintiffs ask this Court to overturn the findings of the Vermont Legislature, and the conclusions of the district court and of the unanimous court of appeals, all of which determined that Act 64's contribution limits were set at levels permissible under the First Amendment. Those judgments should be affirmed.

This Court has made plain that legislative determinations as to the precise dollar amounts for contribution levels are entitled to "significant" deference and should not be "'fine tun[ed]'" by courts. *Shrink*, 528 U.S. at 388, 397 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 137 (less rigorous review takes account of legislative expertise in political campaigns). A "court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30 (internal quotation omitted).[27] And *Shrink* made

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[27] Plaintiffs' argument that no deference should be due to Act 64's contribution limits because they were enacted for the "impermissible purpose" of reducing spending is unsupportable. While the VRSC Plaintiffs cite legislative statements concerning an unenacted version of H.28, which indicate that one intent of that bill was to reduce campaign spending, they fail to note that the bill contained public financing provisions with express spending caps. Ex. I:1, 9. Nor can the statements of one or two legislators concerning a bill that was

clear that the $1,000 limitation upheld in *Buckley* was not "a constitutional minimum below which legislatures could not regulate." 528 U.S. at 397. Appropriate limits will vary based upon the jurisdiction involved.

Following that analysis, this Court has held that contribution limits should be deemed valid unless they are set so low that they prevent candidates from amassing "the resources necessary for effective advocacy" and are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* (citing *Buckley*, 424 U.S. at 21). The limits of Act 64 are not so draconian.

Based upon considerable evidence, the Legislature and both lower courts determined that the limits of $200, $300, and $400 were directed at donations considered "suspiciously large" by most Vermonters. P.A. 59a; J.A. 20 (Finding (a)(3)); Ex. II:664-80 (1995 poll indicated nearly 70% of Vermonters believed a $100 contribution limit would make politicians more responsive to the public). Such evidence came from witnesses offered by both sides. P.A. 59a; *see also* Trs. IX:225-26; VIII:23 (anything over $100 in Vermont is a significant contribution). As one official stated: "$250 to a working Vermonter is a lot of money. You know, it's the car payment. It's the grocery bill for two weeks ... or three weeks." Tr. IX:117.

Correspondingly, small donations are meaningful in Vermont because nearly every contribution is considered to be a "strong act[ ] of political support." P.A. 42a. In fact, the Republican candidate for Governor in 1996 and 1998 personally sent thank you notes to all donors who gave $5 or more. *Id.* Against such a backdrop, the limits of Act 64 are

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amended extensively establish an impermissible legislative purpose or invalidate an otherwise constitutional law. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

certainly a far cry from being "pointless," *Shrink* 528 U.S. at 397, or "laughably low," P.A. 344a.

Historical giving patterns in Vermont persuasively establish that Act 64 is directed solely at significant contributions and will impact only a modest portion of contributions and candidates. Professor Gierzynski's analysis of the 1994, 1996 and 1998 election cycles confirmed that the limitations of Act 64 would have affected fewer than 10% of the overall contributions received in those elections. P.A. 40a; J.A. 65. Specifically, the limits would have affected only 3.5%, 5.4% and 11.9% of the House contributions, only 6%, 4.7% and 17.2% of the Senate contributions,[28] and only 9.5%, 9.9% and 7.8% of the contributions for statewide elections during those years. J.A. 65.

Plaintiffs' attempt to discount this minimal impact by focusing on those few candidates who have relied greatly upon large contributions is unavailing. *Buckley* and *Shrink* do not and cannot stand for the proposition that contribution limits must be geared to the candidates who have chosen to rely upon a few well-heeled contributors. Indeed, one purpose of contribution limits is to diminish the corruption and appearance

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[28] The great majority (73.6% and greater) of legislative candidates would have had to make no changes to their fundraising as they received no contributions in excess of Act 64's caps. J.A. 65, 76. Likewise, the percent of revenue lost as a result of Act 64 in those three cycles would have been only 6.5%, 5.3% and 3.2% for House candidates and 18.2%, 10.8%, and 10.1% for Senate candidates. J.A. 72, 74. While the percentage of revenue lost was greater for some statewide candidates, such high percentages often corresponded to only small amounts of money. Tr. VI:21, 26; *see* J.A. 67 (Milne); J.A. 69 (Milne; Amestoy); J.A. 71 (Flanagan). Moreover, in a number of cases, candidates did not even spend the full amount of the monies they had raised. J.A. 69 & 85 (Dean); J.A. 71 & 86 (Dean; Snelling). In any event, evidence showed that lost revenues could be replaced through alternative campaign methods. P.A. 59a; Trs. V:85-86; VII:101; *see* 424 U.S. at 22.

of corruption that such reliance fosters. *Shrink*, 528 U.S. at 390. Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates. *Daggett*, 205 F.3d at 460.

For similar reasons, Plaintiffs take nothing from their reliance on the flawed report of expert Clark Benson. Benson studied only a single election year, 1998, which happened to show increases over the 1994 and 1996 cycles. Professor Gierzynski testified that drawing conclusions from only one year can be misleading, Tr. VI:73, and Benson agreed that he would have preferred to study additional years, Tr. III:90. Benson's data also excluded candidates who spent less than $500. Ex. III:1020-24. This resulted in his failure to take account of 136 House candidates and 25 Senate candidates, thereby exaggerating the impact of Act 64's limits. *Id.* In light of such deficiencies, the district court implicitly rejected the credibility of Benson and his report in favor of the opinions of Professor Gierzynski. P.A. 39a-40a.

Most importantly, as the district court and the Second Circuit correctly ruled, Act 64's contribution limits will permit candidates to amass sufficient resources to mount effective campaigns. Although some -- but not all -- of Plaintiffs' witnesses offered countervailing testimony, the district court weighed all the proof offered and determined that "the more credible evidence" shows that effective campaigns can be run under Act 64's limits.[29] P.A. 40a. While Plaintiffs continue to cite the contrary evidence they submitted below, the district court's credibility determinations are entitled to deference even in cases concerning the First Amendment. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

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[29] Nearly all witnesses agreed that an effective campaign does not need to be a winning campaign. P.A. 40a n.19; Trs. I:95; II:22; Randall Br. 8-9 (conceding same).

The district court's conclusion was well grounded upon testimony from present and former elected officials, candidates and campaign managers. They provided compelling proof that Act 64's limits would permit effective campaigns at the House, Senate and statewide levels. P.A. 41 n.20; *see* Trs. I:57 (Snelling); IV:187-88 (Howard); V:22, 86 (Hooper); V:141 (Friedman); VII:15-18 (Young); VIII:53-54 (Smith); IX:45-57, 61-62 (Bristol); IX:136 (Ready); X:180-82, 185-186 (Kitzmiller); Exs. IV:1384-85 (Brownell); V:1824 (Fiorillo).[30]

The 1999 race for Mayor of Burlington, Vermont's most populous city, is a telling case in point. In that campaign, Kurt Wright challenged Peter Clavelle. Working under a $200 contribution limit, both candidates "were able to amass sufficient resources to run effective campaigns." P.A. 41a. Clavelle raised almost $39,000, which is more than he had raised in three of four campaigns prior to Act 64. Wright met his fundraising goal of $19,000 and by his own admission ran a competitive campaign, was able to get his message out to a substantial portion of the electorate, and received 40% of the vote. Ex. VIII:2758-67, 3051, 3053, 3071, 3075-76.

The district court rightly employed those figures to support Act 64's contribution limits for state Senate. Campaigns for Senate in Chittenden County, where Burlington is located, had historically averaged $10,000, with the highest spending campaign from 1994-1998 being $34,177. Exs. III:990; IV:1306. Given the amounts raised by Clavelle and Wright, the higher, $300, contribution cap for Senate, and the greater

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[30] Plaintiffs' contention that Act 64 should be invalidated because its limits apply per cycle rather than per election, also misses the mark. The propriety of contribution caps turns principally on their ability to permit effective campaigns, whether for primary or general elections. Vermont's primary and general elections are held only two months apart, some of the closest in the country. Tr. VI:85-86; VIII:71-72. The district court understood this and held that Act 64's limits permitted fully effective campaigns.

geographic area, the district court reasonably determined that the mayoral fundraising provided strong evidence that Act 64's contribution limit for Senate would permit effective advocacy. P.A. 58a-59a.

The VRSC Plaintiffs mistakenly rely on the contention that Wright might have raised more money in the absence of Act 64's limits. VRSC Br. at 18. Even if factually true, such evidence simply provides no basis to invalidate the law. *Shrink*, 528 U.S. at 396; *id.* at 404 (Breyer & Ginsburg, JJ., concurring) (campaign finance laws will always have an adverse impact on some candidates).[31] The evidence shows Wright's campaign was competitive and effective. No more is required.

Given the differing populations and scales, Vermont's caps also compare favorably with the per-election limitations of a number of states, including those from Missouri, which were upheld following remand in *Shrink*. *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842-43 (8th Cir. 2000)($525 for Senate or any office where the electoral district population is 100,000 or more; $275 for House or any office where the district population is under 100,000). In fact, when Vermont's statewide contribution limits are examined in relation to the size of the constituency -- and thus the size of the campaign needed to reach those voters -- Act 64's limits are more generous than those upheld for Missouri. J.A. 55 (ratio of .00068 versus .00040); P.A. 57a-58a; *see also Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093-96 (9th Cir. 2003)($400 for Governor and Lt. Governor, $200 for other statewide office, and $100 for all other offices); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 458-62 (1st Cir. 2000)($250 for Maine's House and Senate); *Florida Right to Life, Inc. v. Mortham*, No.6:98-770, 2000 WL

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[31] If that were the legal standard, federal candidates who might have raised additional monies from foreign citizens, corporations or labor unions, could use that fact to argue against FECA's prohibition of such contributions. *NRWC*, 459 U.S. at 210.

33733256 (M.D. Fla. Mar. 20, 2000)($500 limit in populous Florida).

Even if Act 64's limits require candidates "to raise funds from a greater number of persons" that does not render the law unconstitutional. 424 U.S. at 21-22. If more small donors are encouraged to give, that can hardly be adverse to First Amendment principles.[32] P.A. 59a; Tr: V:119.

IV. Vermont's Party Contribution Limits Are Constitutional

Plaintiffs' challenge to Act 64's limits on the amounts political parties can contribute to candidates is legally and factually flawed.[33] Consistent with *McConnell* and *Colorado II*, Act 64's party contribution limit is targeted to deter party corruption and its appearance and to avoid evasion of the law's other limits. It also permits parties to engage in energetic and effective political advocacy.

Despite Plaintiffs' contrary assertions, VRSC Br. 26, this Court has explicitly recognized that the money flowing into and out of parties has the potential to corrupt candidates and officials. *Colorado II* emphasized that parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 451-52. Accordingly, the Court upheld FECA's limits on coordinated spending by parties as

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[32] A salutary effect of Act 64's limits may be to increase the number of overall donors, as citizens who had felt left out of the process are reconnected. *See* Trs. V:119, 137; VIII:63, 95; IX:137, 241. For example, Rep. Gordon Bristol testified that his mother made her first contribution in 2000 because the contribution finally mattered. Tr. IX:58-59.

[33] Plaintiffs contend only that Act 64's contribution limits are too low, not that parties should be exempt from contribution limits altogether. VRSC Br. 26; Randall Br. 49-50. The latter position is foreclosed by *Colorado II*, which upheld FECA's limits on coordinated party expenditures. 533 U.S. at 464-65. Nor do they contend that the limits for political committees should be higher than those for individuals.

necessary to prevent individuals and PACs from circumventing the law's individual contribution limits. *Id.* at 464-65. *McConnell,* likewise, found that parties sell access to and influence over candidates and officials in return for contributions. 540 U.S. at 145-53. "[C]ontributions to a federal candidate's party in aid of that candidate's campaign threaten to create – no less than would a direct contribution to the candidate – a sense of obligation." *Id.* at 144.

Vermont faces similar concerns. Vermont's political parties, like the federal, offer preferential and private access to candidates at fundraisers in return for contributions. Tr. IX:112-13. As Sen. Ready testified, donors attending such events "haven't bought the person but they have certainly bought a piece of [their] time." Tr. IX:113. Parties also use their contributions to exert improper influence on candidates. Formerly, Vermont placed no limits on party contributions. Evidence below detailed how parties had used large contributions to "buy a candidate, if you will," and influence the candidate's votes, because candidates who are heavily financed by political parties typically follow the party's views. Tr. IX:70-71. Rep. Gordon Bristol saw candidates who received large amounts of party money and consequently "fe[lt] the need to be obligated to that cause, regardless of necessarily what their district wants." *Id.; see McConnell,* 540 U.S. at 153. He admitted that the party had pressured him to change his positions on some issues. Tr. IX:77. He testified that, based on his six years of experience in the Legislature, contributions from either special interests or political parties can affect the way a legislator votes. Tr. IX:71.

As the district court correctly observed, the "threat of corruption...often filters through the party machines," P.A. 73a-74a, and can affect the legislative agenda. Sen. Ready explained how the beverage industry exerted financial pressure to defeat a bill that expanded bottle deposits, even though the bill had overwhelming popular support. Tr. IX:105-111. Donors from the beverage industry gave large amounts of

money to both parties, Ex. V:1766, and industry lobbyists were present at party fundraisers, Tr. IX:109-10. *See* Tr. VII:66 (financial pressures from party and industry defeated drug pricing bill). Likewise, a party leader told Sen. Rivers that if her food labeling bill died in committee, he could take credit and the party might then receive a large contribution from the food industry. Tr. VII:70-71. The bill was defeated in committee. *Id.; see* Exs. I:304 (quarry interest donated $10,000 to the Vermont Republican Party six months before a key legislative vote); V:1758-59 (pharmaceutical companies sponsored party golf tournament when drug bill pending); Tr. V:30-31 (lobbyist attendance at party fundraisers necessary to obtain passage of bills).

Given the money flowing into political parties, contribution limits are further necessary to avoid evasion of Act 64's individual limits. Tr. VIII:191-92. The district court expressly found that Vermonters view political parties as "heavily influenced, if not controlled, by a few large donors." P.A. 37a. The record shows that, in 1998, the Democratic Party received 66% of its revenues from 43 contributors, while the VRSC received 46% of revenues from 39 donors. *Id.*; Exs. III:1018; VII:2403, 2408-09. Under Act 64, donors are permitted to give up to $2000 per election cycle to a political party -- between 5 and 10 times the amount a donor may give to individual candidates. 17 V.S.A. §2805(a)(P.A. 5a). Absent party contribution limits, a group of donors with similar interests (such as industry executives) could effectively "pool" contributions to a political party. The political party could, in turn, use that money to fund a significant portion of the candidate's campaign, thereby evading Act 64's individual contribution limit.[34] Trs. IX-215, 220; X-171-72; Exs. II:455,

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[34] Act 64's anti-pass-through provision, 17 V.S.A. §2805(e), is insufficient to prevent such pooling and is "likely to catch only the most blatant behavior." P.A. 71a. *Cf. McConnell,* 540 U.S. at 143 (anti-bribery laws alone will not eliminate corruption).

632-37. In fact, one of the named Plaintiffs in this case revealed that he had shifted his donations to his party because of Act 64's limit on candidate contributions. Tr. II:174. The district court accurately observed that "[i]t is reasonable to assume that larger special interest donors would do the same." P.A. 71a n.26. The limits on contributions by parties to candidates close this loophole.

Plaintiffs' argument that Act 64's party limits are too low does not withstand scrutiny. To begin with, the Court in *Colorado II* declined to afford "unique" First Amendment status to parties and rejected arguments for treating parties "differently from other political actors subject to limitation on political spending." 533 U.S. at 455. Party contribution limits are not subject to full exacting scrutiny, *see id.* at 453, 456, and the Court has no "scalpel to probe" the precise level chosen by the Legislature, *Buckley,* 424 U.S. at 30. Since Act 64's limits on party contributions mirror those for groups and individuals, the arguments supporting those limits apply with equal force to parties. *See Colorado II,* 533 U.S. at 451-52. In short, the contributions permitted under the law are meaningful acts of association in Vermont, and candidates will still be able to run effective campaigns under the limits. P.A. 39a-42a, 58a-59a; *see supra* Section III.B.

The Plaintiffs' "sky is falling" rhetoric notwithstanding, these contribution limits do not frustrate the associational rights of the political parties or undermine their ability to engage in effective advocacy. Indeed, parties are in a favored position with respect to contributions, because a state party, a national committee, and a party's legislative PACs can each make contributions to a candidate.[35] Moreover, Act 64 places

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[35] Plaintiffs' criticism of Act 64's treatment of state and local committees of a party as a single source is unjustified. The trial evidence showed that this accurately reflects the reality of how parties are run in Vermont, P.A. 77a, and Act 64 does not force a state party to centralize power at the expense of local committees, Tr. IX:10-11.

absolutely no limit on the amounts parties may independently spend to advocate for the election or defeat of candidates or to engage in other party activities, such as get-out-the-vote efforts, registration drives, platform promotion, and absentee ballot facilitation.[36] Trs. I:39, 167-69; II:121-22; IV:60-61, 103; V:35-36, IX:138; X:121-27, 174 (all describing party activities unaffected by Act 64).

Act 64's party limits, thus, serve vital governmental interests while providing for meaningful association, permitting effective campaigns and retaining the parties' important place in elective politics. As such, they are fully constitutional.

V. The Rebuttable Presumption Of Section 2809(d) Is Constitutional

Plaintiffs mistakenly contend that the rebuttable presumption of coordination for expenditures by political parties[37] that primarily benefit six or fewer candidates is unconstitutional. 17 V.S.A. §2809(d)(P.A. 8a). The argument is based on a faulty view of Vermont law and wildly overstates the effect of the presumption of coordination. Rightly viewed, Section 2809(d) imposes little, if any, burden upon parties and does not chill speech.[38]

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[36] Although Plaintiffs contend that parties will no longer be able to contribute donor or voter lists to candidates, evidence showed that parties are chary of sharing donor lists. Trs. I:90-91; V:46-47. As to party-created voter lists, which often contain many inaccuracies, Tr. VII:84-85, the record does not establish that the value of renting or buying such lists would exceed the limits of Act 64. Trs. I:167-68.

[37] The same presumption applies to expenditures by political committees that recruit or endorse candidates.

[38] Plaintiffs do not challenge Act 64's coordination provisions generally, nor could they. Coordinated expenditures may be treated as contributions. *Colorado II*, 533 U.S. at 465; *McConnell*, 540 U.S. at 219; 424 U.S. at 46-47. And, contrary to the dissent below, P.A. 231a, so long as they act independently, Act 64 places no limit upon what supporters can spend or do to champion their candidate.

Section 2809(d) imposes merely an evidentiary presumption on those expenditures most likely to have been furtively controlled by one or more candidates. P.A. 86a & n.28. Under Vermont law, such a presumption allocates the burden of production on an issue -- without changing the burden of persuasion. Vt. R. Evid. 301(a); *State v. Pluta,* 600 A.2d 291, 293 (Vt. 1991). The presumption has no effect at all unless the State or a candidate chooses to litigate whether a particular expenditure was coordinated. 17 V.S.A. §2809(d-e).

If litigation ensues -- as it could for any expenditure, whether covered by the presumption or not -- the rebuttable presumption plays a minor role. It "contributes no evidence" and "disappears when facts appear." *Rocque v. Cooperative Fire Ins. Ass'n,* 438 A.2d 383, 386 (Vt. 1981). In a case covered by the presumption, a political party need only present some evidence "that the presumed fact [is] not true" and the presumption vanishes. *Pluta,* 600 A.2d at 293; *see Rocque,* 438 A.2d at 386. This "bursting bubble" type of presumption has no effect on the burden of persuasion, which remains at all times with the complaining party. Vt. R. Evid. 301(a); *see State v. Giard,* 871 A.2d 976, 979 (Vt. 2005); Ex. II:742 (Secretary of State Regulation 2000-01, interpreting Section 2809).

Once the effect of the rebuttable presumption is properly understood, plaintiffs' arguments against it wither away. Parties and candidates need not "challenge" the presumption, nor must they affirmatively "disassociate" themselves from expenditures. Randall Br. 38-39. The statute does not shift the burden of proof or persuasion, VRSC Br. 45, or create a presumption that any party or candidate has violated the law, Randall Br. 39. All the presumption does -- and again, it comes into play only if the matter is brought to court -- is require the party making the expenditure to come forward with some evidence that the expenditure was not coordinated with the candidate. Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption. P.A. 184a; *cf. Giard,* 871 A.2d at 978 (statutory presumption of

blood alcohol level rebutted by defendant's testimony concerning his alcohol consumption); *Rocque*, 438 A.2d at 386 (presumption of receipt of notice from proper mailing rebutted by testimony that notice was not received). Indeed, the presumption merely puts the duty of going forward with evidence on the person with knowledge of the actual facts -- here, the party making the expenditures. *See* Vt. R. Evid. 301, reporter's note. Placing such an obligation on the party that is in full possession of the relevant facts makes perfect sense.

This "modest" evidentiary requirement, *Giard*, 871 A.2d at 978, imposes a minimal burden at best and does not violate the First Amendment. Vermont's rebuttable presumption is thus entirely unlike the conclusive presumption of coordination struck down in *Colorado I*, 518 U.S. at 619. Nor is it like the presumption in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), the principal case relied on by Plaintiffs. In *Riley*, a state statute presumed that certain fees charged by charitable fundraisers were unreasonable. *Id.* at 785-86. A fundraiser could only rebut the presumption by proving the fees were "necessary" as defined in the statute. And, even if the presumption were successfully rebutted, the factfinder could still find the fee unreasonable based on other factors. *Id.* at 786, 794. Consequently, fundraisers bore a significant initial burden and were exposed to a substantial degree of uncertainty about what fees would be found reasonable under the statute. *Id.*

Parties affected by Section 2809(d)'s presumption are nothing like the fundraisers in *Riley*. They bear no burden of proof but only a minimal burden of producing evidence on facts within their knowledge, and the test for distinguishing between independent and coordinated expenditures is clearly established by the statute, the rule and precedent. P.A. 182a-84a. As a result, parties can and should be able to understand whether their own expenditure has been coordinated with a candidate and should suffer no chilling effect on their speech.

CONCLUSION

The State respectfully requests that the Court: (a) affirm the decision below and uphold the constitutionality of Act 64's limits on the amounts that can be contributed to candidates, the presumption of 17 V.S.A. §2809(d), and the conclusion that the law's expenditure limits are supported by compelling interests; and (b) reverse the decision below and find that Act 64's spending limits are narrowly tailored and constitutional. In the alternative, if additional factual development is necessary regarding narrow tailoring, the Court should affirm the decision below and remand that issue to the district court.

Respectfully submitted,

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Nos. 04-1528, 04-1530 and 04-1697

In The

Supreme Court of the United States

Neil Randall *et al.*,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

Vt. Repub. State Comm.,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

William H. Sorrell *et al.*,
Cross-Petitioners,
v.
Neil Randall *et al.*,
Cross-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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February 8, 2006

QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Respondents in 04-1697*;

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures, Marcella Landell, Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Respondents in 04-1697*;

William H. Sorrell, John T. Quinn, William Wright, Robert Butterfield, Robert Simpson, Jr.; Vincent Illuzzi, James Hughes, David Miller, Joel W. Page, William Porter, Keith W. Flynn, James P. Mongeon, Craig Nolan, Dan Davis, Robert L. Sand and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697*[1];

Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey (deceased), Phil Hoff, Frank Huard, Karen Kitzmiller (deceased), Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697.*

Pursuant to Supreme Court Rule 24.1(b), the Corporate Disclosure Statement within Respondent-Intervenors' Brief in Response and Partial Opposition to Petitions for Writs of Certiorari is incorporated by reference.

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight, and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for Writ of Certiorari in No. 04-1528 was docketed on May 16, 2005. The Conditional Cross-Petition, No. 04-1697, was timely filed on June 14, 2005. This Court granted the Petition and Conditional Cross-Petition on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents, Cross Petitioners Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Phil Hoff, Frank Huard, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson include Vermont citizen groups, individual voters, current and former legislators and officeholders, non-incumbent candidates for state office, Republicans, Democrats, and Independents, who supported and worked for the enactment of Act 64 of the 1997 Vermont Legislature, VT. STAT. ANN. tit. 17, §§ 2801-83 (2005) ("Act 64"), and intervened below to defend the law against this facial challenge to its constitutionality. They join in the Statement of the Case set forth in the brief of Respondents, Cross Petitioners William H. Sorrell *et al.*

SUMMARY OF ARGUMENT

1. The court of appeals correctly determined that Vermont's campaign expenditure limits, 17 VT. STAT. ANN. § 2805a, may be upheld consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in view of the critically important governmental objectives those limits serve: deterring actual and apparent corruption, fostering public confidence in government, protecting candidate and officeholder time from the burden of fundraising, and assuring officeholder accountability through competitive elections. The limits were

enacted in response to deep and broad public concern about the detrimental impact of unlimited fundraising and campaign spending on Vermont's political system. These concerns were documented in lengthy public deliberations before the Vermont Legislature and confirmed by an exhaustive trial record that fully satisfies First Amendment scrutiny.

a. *Buckley*'s requirement of exacting scrutiny does not, as Petitioners urge, automatically invalidate expenditure limits no matter how compelling the interests they serve and no matter how tailored to the costs of running an effective campaign in local political conditions. Instead, it allows such limits to be upheld on a proper record. Under the "closer scrutiny" applicable to spending limits, *McConnell v. FEC*, 540 U.S. 93, 134 (2003), the Court should examine Vermont's post-*Buckley* experience to determine if new facts or legal interests demonstrate compelling justifications for Vermont's spending limits, and if the particular limits chosen by Vermont are sufficiently tailored. Requiring courts blindly to strike down all spending limits without weighing evidence or examining facts would be inconsistent with a proper understanding of our constitutional scheme, which must leave room for states' authority to safeguard their systems of representation in light of states' unique understanding of their own political environments.

b. Vermont's limits on campaign spending are justified by its compelling interests in deterring the reality and appearance of corruption and preserving public confidence in government. Those interests are reflected in the extensive legislative and court record in this case, which in turn reflects the State's increasingly troubled experience with unlimited campaign spending. With no spending restrictions, officeholders orient their legislative choices to contributors, fearing that an opponent will otherwise be able to out-raise and out-spend them. Even when contributions are limited, candidates remain dependent on special interests that can generate large aggregate contributions for the campaign funding race. The record contains frank admissions by

experienced officeholders that the legislative agenda too often is guided by the fundraising "arms race." The Vermont public perceived, with good reason, that legislative policy and access were for sale.

The spending limits also serve Vermont's vital interest in protecting the time of officeholders and candidates from endless preoccupation with fundraising. Act 64 will protect the quality of representative government by enabling elected officials better to perform their duties as representatives and permitting candidates to focus their time and attention on their broad constituency rather than on a narrow group of funding sources.

Vermont's spending limits, in addition, are necessary to assure officeholders' ultimate accountability to voters, which can only be secured in a system that allows meaningful electoral competition. Under a system of unlimited campaign spending, incumbents amass war chests that deter challengers and leave many elections effectively uncontested, thus diminishing officeholder accountability and robust public debate of issues. In this respect in particular, Act 64 furthers, rather than undermines, First Amendment interests.

c. The record demonstrates that Act 64's expenditure limits are narrowly tailored to serve these compelling interests. As the district court found based on an extensive record at trial, and the court of appeals confirmed, Vermont's spending limits are set at levels that permit candidates to run effective, vigorous campaigns. And, contrary to Petitioners' charge of "incumbent protection," the evidence demonstrates that in fact incumbents benefit the most from a system of unlimited spending because of their ability to out-raise and out-spend their challengers. Moreover, Act 64 places a lower spending limit on incumbents than on challengers, ensuring that the incumbent's traditional advantages will not be compounded by a spending advantage.

Nor are there feasible alternatives to spending limits that will allow Vermont to achieve its compelling interests. The alternatives suggested by Petitioners do not remedy the

concerns that prompted Act 64 but rather create equally troubling problems of their own. None of the alternatives proposed would permit Vermont to achieve its crucial goal of assuring the integrity of its electoral process.

d. While the Court need not look beyond *Buckley*'s standard of exacting scrutiny to uphold Vermont's spending limits, the Court may also uphold those limits as a content-neutral regulation of speech. They meet the governing standard for content neutrality set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), because they are "*justified* without reference to the content of the regulated speech." The spending limits are narrowly tailored to serve a significant government interest and are set at a level allowing robust and effective campaigns, thus leaving open ample channels of communication.

2. Vermont's limits on contributions to candidates, 17 VT. STAT. ANN. § 2805, also satisfy this Court's well-established requirements. The Court's precedents repeatedly have confirmed the importance of limits on contributions as a means of deterring the perception and reality of corruption. Act 64 appropriately tailors the contribution limits to amounts that are "considered by the legislature, candidates and officials to be large contributions," J.A. 20, while allowing candidates to raise enough money to run effective campaigns. In asking the Court to second-guess the judgment of Vermont's elected lawmakers as to the contribution levels needed for effective campaigning, and to impose on Vermont the same limits that exist in much larger states where campaigns are far more expensive, Petitioners ignore that courts have no "scalpel to probe" the level at which a contribution limit should be set. *Buckley*, 424 U.S. at 21.

In addition, as set forth more fully in the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, Act 64's limits on political party contributions to candidates and the statute's rebuttable evidentiary presumption that certain party expenditures are "related expenditures" fully satisfy

constitutional requirements and should be upheld by the Court.

ARGUMENT

I. Vermont's Limits on Candidates' Campaign Expenditures Satisfy First Amendment Scrutiny.

A. Vermont's Expenditure Limits Are Permissible Under Buckley's *Standard of Exacting Scrutiny.*

Vermont enacted limits on candidates' campaign spending to protect the integrity and accountability of Vermont government and preserve the confidence of the State's citizenry in the electoral process.[2] Petitioners contend that any such regulation is *per se* forbidden by the First Amendment. That argument should be rejected. Act 64's spending limits further the most weighty governmental interests, including interests that are essential to fulfilling the purposes of the First Amendment.

Petitioners' principal contention is that this Court in *Buckley v. Valeo* created an absolute First Amendment right to engage in unlimited spending, no matter how great the

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[2] Act 64 set the spending limit for candidates for Governor at $300,000; for Lieutenant Governor at $100,000; for Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General at $45,000; for State Senator or county office at $4000 plus – in the case of candidates for State Senator an additional $2500 for each additional seat in the Senate district; and for State Representative at $2000 in a single-member district and $3000 in a two-member district. 17 VT. STAT. ANN. § 2805a. Incumbent candidates for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General are entitled to expend only 85 percent of the spending limit for their respective offices, and incumbent candidates for State Legislature are entitled to expend only 90 percent of the spending limits for their offices. 17 VT. STAT. ANN. § 2805a(c). In 2005, the Legislature increased the spending limits by tying them to the Consumer Price Index. 17 VT. STAT. ANN. § 2805a(e). *See* Vermont Secretary of State, Guide to Vermont's Campaign Finance Law (November 2005), http://vermont-elections.org/ elections1/2005_cf_guide_1118.htm (last visited Feb. 7, 2006) (listing updated spending limits).

harms to governmental interests and no matter how closely a limit is tailored to local political conditions. In fact, *Buckley* requires "exacting scrutiny," 424 U.S. at 16, not automatic invalidation, and permits spending limits to be upheld on a proper record. Contrary to the contention that expenditure limits are forbidden, this Court has confirmed that they simply are subject to "closer scrutiny" than are limits on contributions. *McConnell*, 540 U.S. at 134; *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado Republican II*"), 533 U.S. 431, 440 (2001).[3] Petitioners' contrary reading attributes to *Buckley* a *per se* rule directly at odds with the Court's "strict scrutiny" jurisprudence; such review is not "strict in theory but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citations and internal quotations omitted).

This context, more than any other, calls for a careful application of constitutional scrutiny rather than the categorical imposition of *per se* rules. The Tenth Amendment preserves for the states "the power to regulate elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citation and internal quotations omitted). States moreover play an essential role as laboratories of reform in our federal system. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The doubts expressed by the *Buckley* Court that expenditure limits would be necessary to protect the integrity of government are fully addressed by the record in this case. *Buckley* embraced the government's compelling interests in deterring the reality and appearance of corruption and assuring public confidence in government, 424 U.S. at 26-27, but believed, on the record before it, that the contribution limits of the Federal Election Campaign Act ("FECA"), Pub.

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[3] Although the Court confirmed in *McConnell* and *Colorado Republican II* that expenditure limits are subject to closer scrutiny, neither those cases nor any case before this Court since *Buckley* has reviewed a statute limiting candidates' expenditures.

L. No. 92-225, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974), alone would be sufficient to serve those interests. *See id.* at 56 ("There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient[.]").[4] Thus, *Buckley* rejected the assertion that spending caps were a necessary concomitant to contribution limits only as a matter of fact, not of law.

Nor did *Buckley* foreclose consideration of factual developments illuminating different compelling interests, such as protecting the time of officeholders and candidates, as well as assuring officeholder accountability through competitive elections, that could justify campaign spending limits. Three particular governmental interests were presented in *Buckley*: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. 424 U.S. at 55-56. This Court did not broadly hold that other compelling interests could never be considered; rather, it stated that "[n]o governmental interest *that has been suggested* is sufficient to justify [the federal spending limits]." *Id.* at 55 (emphasis added).

Vermont's thirty years of experience post-*Buckley*, reflected in the record here, demonstrate that, in fact, limits on overall spending are necessary to respond to the realities of campaign-finance-related corruption and undue influence, assure public confidence, and protect the quality of representative government. Pet. App. 128a-35a & n.13; *infra*

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[4] Prior to the Federal Election Campaign Act of 1971 and the 1974 amendments to FECA, neither individual contributions nor spending in federal elections had been subject to meaningful limits. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 15-17 (2005) (describing ineffectiveness of pre-FECA limits).

this Part; *McConnell*, 540 U.S. at 152 (government entitled to take into account "the realities of political fundraising" revealed by the record).

Experience also has not borne out *Buckley*'s assumption (*see* 424 U.S. at 19) that a restraint on spending would operate identically to a direct restraint on speech. In fact, as demonstrated more fully *infra*, the post-*Buckley* record shows that campaign spending is a function of many factors unrelated to the needs of communication and debate, including special interests' determination to secure favorable governmental policies, and the use of campaign war chests to deter challengers. Even the research of Petitioners' expert establishes that increased campaign spending reflects not the increased costs of getting candidates' messages out to voters, but instead the fact that "[t]he more favors the government has to give out, the more resources that people will spend to obtain those favors." Ex. VI:2202, Tr. III:206-07 (Lott); *see* Ex. VI:2264 (characterizing as a "myth" the contention that increased costs of television advertising account for increased campaign expenditures).[5]

A rule automatically invalidating expenditure limits would disregard the significance of the interests underlying campaign finance laws.[6] As Respondents now demonstrate,

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[5] "Tr." refers to the trial court transcript, the entirety of which was made part of the Second Circuit record; "Ex." refers to the sequentially paginated trial exhibit appendices submitted to the Second Circuit.

[6] The lack of merit in such a mechanical rule of invalidation is particularly clear in light of the facts of this case. Petitioners state that even an "unknown challenger" can run an effective campaign in Vermont for "$4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor." VRSC Br. 42. Yet Petitioners' proposed First Amendment right to engage in unlimited campaign spending would require this Court to invalidate Vermont's limits without *any* consideration of the compelling interests they serve, even if the limits were set at the level Petitioners *concede* to be adequate for an effective campaign by the *most* disadvantaged candidates. *But see infra* Part I.C.1 (demonstrating that Petitioners' figures are in fact inflated and that fully effective campaigns can be conducted under Act 64's limits).

the interests underlying spending limits are notably of constitutional magnitude. Deterring corruption, fostering public confidence in government, protecting candidate and officeholder time, and assuring officeholder accountability through competitive elections all safeguard the political representation that is the essence of our constitutional democracy. By serving these interests, Vermont's spending limits "protect the integrity of the electoral process," the "very 'means through which a free society democratically translates political speech into concrete governmental action.'" *McConnell*, 540 U.S. at 137, 158 (recognizing protection of integrity of electoral process as a "constitutional interest[]") (citation and internal quotations omitted).[7] "[W]hat is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process[]" – issues "not less than basic to a democratic society." *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) (addressing Corrupt Practices Act).

B. *Vermont's Weighty Interest in Preserving the Integrity of Its Democratic Process Justifies the State's Limits on Candidates' Campaign Spending.*

1. The Pressures of Unlimited Fundraising Foster Corruption, Undue Influence, and Public Cynicism About the Integrity of Vermont Government.

Deterring corruption of elected officials and avoiding the appearance of corruption are prototypical compelling governmental interests. *McConnell*, 540 U.S. at 143-54; *Buckley*, 424 U.S. at 26-27. The interest in deterring

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[7] Although *McConnell* addressed contribution limits, the Court stated that its analysis "reflects more than the limited burdens [the contribution limits] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits." 540 U.S. at 136.

corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U.S. at 150 (citation and internal quotation marks omitted). Manifestly, a state has a compelling interest in maintaining the public's "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). *See also McConnell*, 540 U.S. at 187 ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders"); *cf. id.* at 317 (Kennedy, J., concurring in the judgment in part and dissenting in part) (campaign regulations that directly address "candidates' and officeholders' quest for dollars" lie closer to core of *Buckley*'s anti-corruption concern than measures less directly concerned with candidates' solicitation of funds).

a. Without spending limits, Vermont candidates increasingly feel compelled to raise the maximum amount possible to forestall the possibility of being outspent. Witnesses described "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII:57 (Smith). "I guarded against [being outspent] by raising more money than I thought that I'd need and more money than I thought [my opponent] would raise or spend." Tr. V:32 (Hooper). *See also* Tr. VII:75-76 (Rivers); Tr. II:198 (Patch). Instead of promoting a candidate's autonomous choice of how much to spend in disseminating his message, the absence of spending limits "condemns [candidates] to a cyclical prisoners' dilemma, where each candidate must continue to raise and spend more money in order to prevent the other from obtaining an advantage." Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609,

1617 (1999).[8] As the court of appeals observed, "[t]he significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating this potential of being vastly outspent that leads to the 'arms race' mentality among candidates and elected officials." Pet. App. 149a.

Petitioners point out that campaigns in Vermont are "relatively low-budget affairs." Randall Br. 32. However, while it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more, Tr. VII:75-76 (Rivers); Tr. V:31-32, 51 (Hooper); Tr. VIII:57-58 (Smith); Tr. IX:134 (Ready), or because a campaign war chest deters potential opponents, Ex. I:0394-0395 (Frothingham); Tr. III:163-164 (Lott); Tr. X:80 (Gross).

b. The debts incurred in this money chase come due after election day. Vermont's experience demonstrates that, under a system of unlimited campaign expenditures, the fundraising chase directly drives legislative and governmental policy in a manner antithetical to the proper functioning of representative government. As the court of appeals found, "[t]he agenda of candidates and elected officials is affected by the perceived need to raise increasing amounts of funds. . . . This affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed." Pet. App. 150a. It continued, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns." *Id.* 134a. Even plaintiff Donald Brunelle acknowledged that when a

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[8] As Professor Neuborne observes, "[t]he vast bulk of candidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War." *Id.*

candidate solicits donations, "now you're beholden to those people that you're asking in some cases." Ex. VII:2706.

Both at trial and during the legislative process leading to the enactment of Act 64, witnesses intimately familiar with Vermont politics repeatedly described the growing influence of fundraising pressures in determining public policy, and the resulting harm to the integrity of state government. *See* Tr. IX:88-95, 100-12; Ex. III:0785, 0787; Ex. V:1766 (testimony and exhibits on influence of slate industry over development permit exceptions and bottle industry donors over bottle redemption bill). Representative Marion Milne, a Republican and a defendant-intervenor, commented during floor debate on Act 64: "We have candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity." Ex. II:0732.[9]

Because of the pressures to avoid being bested in the race for campaign funding, the consequences of losing an entire industry as a source of donations directly influence the actions of legislators. "'We've already lost the drug money, and I don't need to lose the food manufacture[r] money too'" becomes the dubious touchstone of policymaking. Pet. App. 131a; *see* Tr. VII:70. A former Republican Lieutenant Governor of Vermont, Peter Smith, confirmed that the need for campaign cash constantly intrudes on policy decisions: "You have to initially consider . . . whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." Tr. VIII:26. As one example, Mr. Smith described how the campaign funding provided by a professional group (ophthalmologists) "absolutely was" a factor as he considered casting a tie-

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[9] *See also* Ex. II:0505 ("[c]ampaign fundraising and lobbying are inextricably, completely linked in Vermont"); Tr. VII:74-75; Ex. III:0763.

breaking vote on legislation affecting the group. Tr. VIII:41-42; *see* Tr. VIII:43 (it "tarnished the process").[10]

Regardless of the formality or informality of the methods used, a special interest's financial clout with candidates extends far beyond the size of individual contributions when the need for funds is limitless. Donors affiliated with a particular interest can coordinate the timing of their contributions through formal or informal "bundling" practices,[11] or can contribute at fundraising events where a company or industry group is given access to legislators.[12] Or, in a small state such as Vermont, it often will simply be obvious when, for example, the slate industry or health care interests are generating multiple contributions to candidates.

This spending chase also saps public confidence in government, because the perception of corruption is a function not just of the size of donations, but also of high overall levels of fundraising. The Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have

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[10] "[T]he merits of the case were, if you will, infused . . . by the financial power of the groups. . . . We were talking about merit on the one side, which was a technical judgment, and power as represented in money on the other side." Tr. VIII:42.

[11] *See* Pet. App. 100a (noting "widespread use of manipulative contribution devices, such as 'bundling,' which enable special interests to direct large quantities of money by way of individual contributions to particular candidates"); Ex. III:0783; Tr. V:63-64; Ex. I:0218-19. "Donors and recipients understand that bundled contributions are not isolated contributions, but a block of gifts coming from the same source." Lisa Rosenberg, Center for Responsive Politics, *A Bag of Tricks: Loopholes in the Campaign Finance System* (1996), *available at* http://www.opensecrets.org/ pubs/law_bagtricks/contents.asp (last visited Feb. 7, 2006). The impact of bundling cannot be addressed by a ban on indirect donations, because donors can easily coordinate the timing of their contributions without having to transmit them indirectly.

[12] Tr. IX:112-13 (Ready); Tr. VII:58-61 (Rivers); Ex. III:0766; *see also id.* at 0767-768, 0770, 0755 (news articles on use of fundraisers to provide access).

increased," lessening "[c]itizen interest, participation, and confidence in the electoral process." J.A. 20-21.[13]

Petitioners argue that Vermont officeholders are merely showing a healthy responsiveness to supporters when they make legislative decisions based on fundraising needs. VRSC Br. 49. This argument is misguided. A legislative policy decision based on the need for campaign cash is not equivalent to a legislative policy decision based on the needs of voters. If it were, anti-bribery laws would become constitutionally suspect. "[S]uch influence of campaign contributors is pernicious because it is bought. . . . Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it." Pet. App. 134a. "Implicit . . . in the sale of access is the suggestion that money buys influence." *McConnell*, 540 U.S. at 154. The First Amendment should not be transformed into an instrument requiring Vermonters to accept this state of affairs.[14]

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[13] *See* Tr. VIII:58-59 (Smith) (when candidates' focus is "raise as much money as you can raise," it "leads to the sense that the process is about someone else and for someone else and available to other people" and effect on public perception is "corrosive"); Tr. V:83-84 (Hooper) (the concern "applies as well to the spending of money" because citizens "feel powerless and extremely cynical" when they see "campaigns costing ever more money"); Ex. III:0916-17 (Douglas) (big spending means big fundraising, and creates appearance of corruption); Ex. III:1040-41 (Gross report) (high-spending campaigns can dampen participation by reinforcing the public's cynicism about the impact of money on the political process); Ex. V:1831-32.

[14] *Buckley* observed that no harm would result if a candidate raised one dollar from a million people and then spent it all. 424 U.S. at 56 n.64. From this, Petitioners conclude that funds "legally raised" cannot give rise to the reality or perception of corruption. Randall Br. 26. But, as the court below noted, "the reality of campaign financing in Vermont is a far cry from [Buckley's] idyllic vision of political fundraising." Pet. App. 133a. Instead, the financial constituencies that can generate large funding amounts, not the hypothetical one-dollar donor, command the candidate's attention. *Buckley* does not forbid courts from taking into account "the

c. Spending limits alter the dynamic of unlimited indebtedness flowing from unlimited fundraising in Vermont. First, when a candidate knows the upper limit of funds that will be necessary for a campaign, the pressure to court and orient policymaking decisions to a particular special interest based on its financial clout is greatly reduced, since each additional dollar no longer is irreplaceable. Candidates will no longer be locked into "the sort of stampede or nuclear arms race mentality that we currently have." Tr. VIII:57 (Smith). As the Second Circuit noted, "with a limit on how much money can be spent, elected officials testified that they would be more willing to take a position which a particular industry opposed." Pet. App. 150a.

Second, spending limits enhance voters' ability to hold candidates accountable for financing their campaigns in ways that create indebtedness to particular narrow interests. When there is an upper limit on the funds a candidate may collect, the excuse that "I can't unilaterally disarm" falls away, making candidates more accountable to voters for the funds they pursue. In the absence of such a limit, a candidate who courts large aggregate sums from, say, labor or the financial services industry has a ready-made excuse: "I can't afford to limit my fundraising because my opponent may outspend me if I do."[15] Voters have little ability to punish candidates at

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realities of political fundraising" revealed by the record. *McConnell*, 540 U.S. at 152.

Nor are Petitioners correct in arguing, per Judge Winter's dissent, that *Buckley* fully considered and addressed the array of practices, such as bundling, that can erode the effectiveness of contribution limits in combating the reality and appearance of corruption. Judge Winter points to the "highly publicized scandal" of pooled contributions by the dairy industry at the time of *Buckley*. Pet. App. 262a. But those defending the FECA limits in *Buckley* argued that FECA's *contribution* limits and its regulation of political committees would address the abuses revealed by the dairy industry's practices. Br. for Appellees Center for Public Financing of Elections et al. 131-32 (Nos. 75-436, 75-437).

[15] *See* Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4

the ballot box for incurring such indebtedness to special interests, because the candidate's opponent is doing the same.

Third, by reducing candidates' preoccupation with fundraising, spending limits will strengthen public confidence and participation in government in Vermont. By including limits on both spending and contributions, a principal sponsor of the bill explained that the legislation sought to " turn around the cynicism and the lack of participation on the part of many ordinary people that believe that their government is not about them, but about powerful, special interests. . . . [T]hat trend is corrosive and damaging to democracy . . .." Tr. VII:88 (Rivers).

2. Unlimited Campaign Spending Harms the Integrity of Vermont State Government Because Candidates Spend Inordinate Time and Attention on Fundraising.

Concern over the amount of time that candidates devote to fundraising was a critical part of the public debate leading to the enactment of Vermont's spending limits, and was confirmed by trial testimony. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures–which tend to . . . free candidates and their staffs from the interminable burden of fund-raising . . . –will be adverse to

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CONN. PUB. INT. L.J. 308, 335-37 (2005) (describing negative consequences to candidates who turn down campaign donations).

the interest in informed debate protected by the First Amendment.").

a. As the court of appeals found, "the evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." Pet. App. 140a. "[U]nlimited [campaign] expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests," *id.* 139a,[16] and "financial necessity . . . requires that elected officials spend time with donors," *id.* 141a-42a; *see id.* 140a (donors able to "dominate candidates' time."); Tr. IX:166-67, 194; Tr. V:29-30; Tr. VII:24; Ex. III:0896 (all describing how fundraising pressures allow donors to command officeholders' time).[17]

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[16] *See, e.g.*, Ex. I:0092 (fundraising demands required Vermont candidates to concentrate on "out-of-state fundraising events" in "Washington, New York or California") (floor speech of Sen. William Doyle (R)); *id.* (Act 64 necessary so that "there will be increased time for real debate; that candidates will be able to concentrate more on issues rather than raising public money"); Ex. III:0773 (prominent Vermont business lobbyist observes that "[p]oliticians are forced to spend as much time begging as they do campaigning"); Tr. VIII:24 (Smith) (the farther a candidate progresses politically, "ineluctably, the more time you spen[d] . . . raising money and the more attention you pa[y] to the people who gave you big money"); Tr. V:119 (Hooper) (in running campaigns with no limits, the "way I would spend my evenings often . . . would be back hustling campaign money" instead of making contact with voters); Ex. I:0095 (legislative finding noting that candidates for statewide office "are spending inordinate amounts of time raising campaign funds").

[17] *Buckley* did not address the governmental interest in protecting the time of officeholders as a basis for candidate spending limits. *See* Pet. App. 138a-39a; Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. (forthcoming 2006) (manuscript at 30 n.28, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816244 (last visited Feb. 7, 2006)); Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1287 (1994).

The time demands of fundraising harm Vermont's representative process in several related ways. The time occupied by fundraising is a distraction from the representative function, as confirmed by the district court's factual finding that "the need to solicit money from large donors at times turns legislators away from their official duties." Pet. App. 36a. This has real costs for the quality of representation, a concern of constitutional dimension in any democracy. As one scholar has observed,

> [T]here is a failure of representation when candidates spend as much time as most of them now do attending to the task of fund-raising. This feature of modern representation should trouble those who favor close constituent control as well as those who favor relative independence for legislators; those who favor an "aristocracy of virtue" as well as those with more populist ideals regarding who should serve . . . . Whatever it is that representatives are supposed to represent . . . they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.

Blasi, *supra*, at 1304.[18]

The pressures of unlimited fundraising also undermine the role of the campaign itself as a forum for open and robust public debate. In a democracy based on ideals of self-government, campaigns for public office do not exist solely to allow one-way communication of a candidate's views to the electorate, but also importantly serve as a principal means

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[18] *See also* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1769-70 (2001); Alexander, *supra*, at 12-17 (describing evidence of damage to the representative function).

of "educating candidates – preparing them to most effectively represent the people." Alexander, *supra*, at 37. "In order to function fully, representative democracy requires that the people be able to educate and even instruct their elected officials, so that their will may be done in government." *Id.* The process of dialogue and education is woefully shortchanged if a candidate's time is preoccupied with courting and listening to donors rather than to the candidate's much larger voting constituency.

The district court, after a ten-day trial, found that Vermont's spending limits are "an effective response" to "certain compelling governmental interests not addressed in *Buckley*," including "'[f]reeing office holders so they can perform their duties.'" Pet. App. 65a (citations omitted). If campaigns are governed by spending limits, explained one legislator:

> I can spend the whole rest of my campaign, once I have raised that money, out with the public . . . . I can go door to door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere making fundraising calls.

Tr. IX:129 (Ready). *See* Tr. VII:72, 88 (Rivers); *see also* Tr. V:119 (Hooper); Tr. VIII:23-24 (Smith); Tr. IX:194-95 (Pollina).

Notwithstanding the relatively low costs of Vermont campaigns, the evidence canvassed above, the findings of the Vermont Legislature, and the findings of both courts below all establish that the distractions of fundraising already have distorted the representative process in Vermont and that the problem will continue to worsen as fundraising in one election raises the bar for the next. This Court has decisively rejected the contention that "a State's political system [must] sustain some level of damage before the

legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). That principle applies fully here.

b. Petitioners err in arguing that Vermont should address its time-preservation interest by raising or eliminating the State's limits on the size of contributions. VRSC Br. 43-44. That approach is implausible because it would require the State to abandon its compelling interest in deterring the corruption that stems from candidates' receipt of large contributions (*see infra* Part II), and thus would "'deny to the [state] in a vital particular the power of self protection'" *McConnell*, 540 U.S. at 224 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).

Nor is there merit to the argument that contribution limits create the problem of excessive attention to fundraising. Only a comprehensive system in which both contributions and expenditures are subject to some reasonable limit can address the State's compelling interests in time-preservation and deterring corruption. In a system with no spending limits and no contribution limits, the time devoted to fundraising – and to courting the wealthiest interests at the expense of outreach to a broad constituency – will only continue to increase. If one candidate can raise a large war chest from a handful of donors, an opponent wishing to eschew such indebtedness will be forced to spend even more time fundraising to catch up than if all candidates faced limits on the size of contributions. And because a candidate would never know how much an opponent might raise, the pressure to engage in unlimited fundraising would be unabated. "No package of campaign finance reforms will change substantially how representatives spend their time unless war chests are made unimportant." Blasi, *supra*, at 1285.[19]

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[19] Nor would raising the contribution limits reduce the time candidates spent on fundraising. When Congress raised FECA's hard-money limits from $1,000 to $2,000 in 2002, *see* 2 U.S.C. § 441a, federal candidates did not raise the same overall amount in larger chunks; instead,

3. The Critical Interests Served by Electoral Competition Justify Vermont's Spending Limits.

In addition to the compelling interests recognized by the Second Circuit just discussed, other substantial governmental interests support the constitutionality of Act 64's expenditure limits. The accountability of elected officials and the very possibility of a robust debate of the issues depend upon competitive elections.

> Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable. Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose[] a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Ex. III:1044-45 (Report of Dr. Donald Gross). *See* Tr. IX:132-33 (Pollina); Tr. IX-132 (Ready); Ex. I:0394-96 (testimony before legislative committee). Unlimited

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they simply increased their overall fundraising, expanding the arms race and placing ever more emphasis on fundraising. Indeed, in 2004, after the federal hard-money contribution limits were raised, both major-party presidential candidates opted out of the public financing system for their primary elections, with President Bush raising over two-and-a-half times more than in his 2000 primary ($269.6 million in 2004 compared with $95.5 million in 2000) and the Democratic nominee raising nearly five times the 2000 primary amount ($234.6 million for Senator Kerry in 2004 versus $48.1 million for Vice President Gore in 2000). Federal Election Commission, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), *available at* http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html (last visited Feb. 7, 2006).

campaign spending, by undermining the very conditions needed to promote a debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), thus threatens, rather than promotes, First Amendment values. As the Vermont Legislature found, "Robust debate of issues . . . [has] decreased as campaign expenditures have increased," and many Vermonters are unable to seek election to public office due to the great financial burden of running campaigns. J.A. 20.

Vermont has conducted its elections without limits on campaign spending since 1976. During the nine election cycles prior to the enactment of Act 64, only one incumbent lost a campaign for any statewide office. In many of these elections, the incumbent had no viable challenger. For the office of State Treasurer, the incumbent had no major opposition in five of those races; for Secretary of State, the incumbent had no major challenger in four races; for Attorney General, the incumbent had no major challenger in six races. Ex. V:1692-94.[20]

Thus, Petitioners' claim that unlimited spending allows challengers to overcome the incumbents' advantages rests on the flawed assumption that most challengers are capable of outspending incumbents. Especially as races become more expensive, incumbents generally have an easier time raising

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[20] In elections for Congress, campaign expenditures also have remained unlimited since 1976. Congressional incumbents nevertheless have consistently enjoyed re-election rates of over 90%. Ex. III:1046. In 2004, 98.7% of House incumbents won re-election. (This figure, which excludes the two House elections in which incumbents faced each other, was calculated based on data from Center for Responsive Politics, 2004 Election Overview, Winning vs. Spending, *available at* http://opensecrets.org/overview/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 4, 2006). Challengers for a House seat in that same year raised $192,945 on average, while House incumbents raised an average of $1,122,385. By contrast, in Albuquerque, New Mexico, which enforced mandatory spending limits for city elections for over twenty-five years, no incumbent mayor was re-elected while the limits were in force. Tr. X:87-88 (Gross).

money for their races than challengers because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III:212 (Lott); Tr. X:80 (Gross); Tr. IX:231-32 (Pollina).[21] In the three election cycles prior to the effective date of Act 64, the gubernatorial challengers were consistently outspent, and defeated, by the incumbent. J.A. 84-86; *see also* Pet. App. 42a-44a. Senate incumbents in Vermont spent more money than challengers in each of the three election cycles studied. J.A. 87.[22]

The many advantages enjoyed by incumbents, such as their greater name recognition, often therefore are simply compounded by the incumbents' ability to outspend the challengers as well. Even Petitioners' witnesses confirmed that the worst-case scenario for a challenger is when an incumbent's built-in advantages are combined with the ability to outspend the challenger. *See, e.g.*, Tr. I:210 (Garahan).

Empirical research further demonstrates that, for challengers to be competitive, the important factor is not the absolute level of their spending, but the ratio between their spending and that of the incumbent. Ex. III:1048. Act 64 guarantees that any challenger who is able to raise the full amount permitted by the limits will be able to *outspend* the incumbent, because the spending limits applicable to incumbents are lower than those applicable to challengers.

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[21] Indeed, some of the Petitioners in this case were outspent by the incumbents they challenged and had never been able to raise sums for their campaigns as large as those permitted by Act 64's limits. *See* Tr. II:32, 34 (Libertarian Party Chair Scott Berkey); Ex. V:1755 (Brunelle). It is absurd for Petitioners to suggest that they would have done worse under Act 64, which permits challengers to outspend incumbents. *See also* Ex. VIII:3076-77 (Petitioners' witness Wright); Tr. I:68-70 (Petitioners' witness Snelling).

[22] In the Vermont House, while challengers on average spent slightly more than incumbents, both challengers and incumbents spent less than the Act 64 limits would allow, and the limits therefore would not impede House challengers in these very low-budget races. J.A. 88.

Pet. App. 7a. The pro-competitive impact of this system is confirmed by one of Petitioners' expert witnesses, whose research indicates that imposing lower spending limits on incumbents than on challengers would make campaigns more competitive over time. Tr. III:217-19 (Lott).[23]

Research not available to the *Buckley* Court further demonstrates that high levels of campaign spending not only inhibit the robust debate fostered by competitive elections, but also do nothing to encourage voters' engagement with the electoral process. Examination of the impact of spending levels shows that, if anything, higher spending discourages individual voter engagement. While higher spending may increase candidate name recognition, it tends to decrease the likelihood that a voter will be interested in an election, concerned about the outcome of the election, or able to discern the ideological placement of the candidates. Tr. X:71-76 (Gross); Ex. V:1800-1805 (analysis of campaign spending and cognitive engagement); Ex. V:1810-1815 (statistical basis of analysis). Higher spending also is more likely to decrease an individual's likelihood of participating in the election. Tr. X:56-58 (Gross). The reality is thus very different from the assumption of the Court in *Buckley*, based on the limited record before it, that the more candidates spend, the more they "make their views known" to the electorate, thus enabling the electorate better to evaluate

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[23] Petitioners cite a witness's complaint that incumbents should be limited to fifty percent of the challenger's spending to eliminate entirely the advantages of incumbency. VRSC Br. 43. This complaint is illogical because the system of unlimited spending that Petitioners advocate does not hold incumbent spending to fifty percent of the challenger's spending either. The relevant question cannot be whether the spending limits completely eliminate incumbents' advantages, which exist independently of Act 64, but whether, as the evidence shows, the limits are likely to make elections more competitive than the current system.

candidates and "choos[e] among them on election day." 424 U.S. at 52-53.[24]

Although Petitioners emphasize *Buckley*'s holding that the mere desire to enhance the relative voices of those who lack campaign funds did not justify FECA's spending limits, 424 U.S. at 48-49, the interest in promoting electoral competition is of a wholly different character. It is based not on concerns about whether one candidate is poorer than another, nor whether one speaks more loudly than another, but instead on the goal of securing officeholders' ultimate accountability to voters, which can happen only in a system that allows meaningful competition. "[T]he possibility that in any given election the people may exercise their authority to vote out current officeholders[] is the ultimate security of popular control over government." Richard Briffault, *The Return of Spending Limits: Campaign Finance After* Landell v. Sorrell, 32 FORDHAM URB. L.J. 399, 433 (2005). As noted, that possibility is thwarted when incumbents combine their built-in advantages with the ability to out-raise and out-spend their challengers.[25] The same lack of voter choice and control results in an open-seat race when a candidate with a huge funding advantage enters the race and discourages other challengers from coming forward. *Id.* at 434. "[T]he interest in competitive elections . . . is constitutionally compelling because electoral competitiveness is essential to the public

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[24] Indeed, polling data shows that Vermont voters view less expensive sources of information, such as public forums, meeting the candidate in person, and unpaid news coverage, as more important sources of information about candidates than paid media. Ex. III:0846-0847, 0851.

[25] Moreover, this dynamic is often at work even in races in which the incumbent ends up spending little. Serious challengers often do not run because they recognize that the incumbent can gear up his fundraising operation to meet any real threat from a challenger. Tr. X:33; *see also* Tr. VII:148. A system of unlimited spending thus paradoxically may result in a quieter campaign than would be true if limits were in place that assured challengers they will not be badly outspent.

accountability that elections are intended to promote." *Id.* at 435.

C. Vermont's Limits Are Sufficiently Narrowly Tailored to Satisfy Exacting Scrutiny.

The court of appeals remanded the case for the district court to determine whether Vermont's spending limits are sufficiently narrowly tailored to satisfy constitutional scrutiny. That aspect of the judgment should be reversed, and this Court should enter a judgment holding that the expenditure limits satisfy the First Amendment, as the record adequately demonstrates the narrow tailoring of Vermont's spending limits. Act 64 permits candidates to amass the resources needed for effective campaigns, and there are no less restrictive alternatives that will adequately serve Vermont's compelling interests.

1. Act 64 Permits Candidates to Amass the Resources Needed for Effective Advocacy.

Vermont's spending limits are narrowly tailored to allow candidates to "amass[] the resources necessary for effective advocacy," *see Buckley*, 424 U.S. at 21.[26] In setting the limits, the Vermont Legislature considered such factors as the State's population, costs of campaigning, past spending patterns in elections, the testimony of numerous witnesses at hearings, and legislators' knowledge of campaign costs. Ex. I:92, 254-63, 267; Ex. II:443, 533-34, 645-47, 664-80; Ex.

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[26] Whereas the VRSC petitioners agree that the narrow tailoring inquiry examines the resources necessary for effective advocacy (Br. 29), the Randall Petitioners argue that any effort to "fine-tune" the limits is futile because *any* ceiling on expenditures will "necessarily restrict the spending of some candidates" and is therefore unconstitutional, Br. 37. This merely reiterates that spending limits are not subject to exacting scrutiny but are unconstitutional *per se*, to which Respondents already have responded. Under *Buckley*'s exacting scrutiny standard, the spending limits are subject to "closer scrutiny" than contribution limits, *McConnell*, 540 U.S. at 134; *Colorado Republican II*, 533 U.S. at 440; not automatic invalidation.

V:1686-1712, 1720-34; Tr. IX:226-28; Tr. X:18-20; *see also* Pet. App. 32a-33a, 100a.[27] Vermont candidates can communicate their messages to the public and run vigorous campaigns under Act 64's limits. The district court, which was closely familiar with local realities, so found after canvassing extensive evidence on Vermont campaigns and past spending patterns. App. 42a-44a.

The limits of Act 64 are tailored to local political conditions. With respect to the State Legislature, most candidates over the three election cycles prior to Act 64 spent less than the amounts allowed under the limits. Pet. App. 42a-43a.[28] In 1998, all categories of House candidates – incumbents, challengers, Democrats, Republicans, Progressives – spent less than the Act 64 spending limits on average. J.A. 88. Because Vermont House districts are so small, effective House campaigns have relied primarily on

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[27] The Vermont Legislature also created a mechanism for reviewing the limits through Section 23 of Act 64, which required two House and Senate committees to study the impact of Act 64 on the 2000 election cycle, "evaluate the effects of contribution and expenditure limitations and public financing on the election process," and report their findings to the General Assembly. *See* Ex. I:0105. Thus, had the expenditure limits not been enjoined, this review mechanism would have allowed legislative evaluation of how the limits operated in practice.

[28] Vermont House and Senate candidates generally do not advertise on television, because of the "lack of congruence between media markets and district boundaries." J.A. 42-43, *see also* Pet. App. 44a; J.A. 24-30 (plaintiffs' Responses to Requests for Admissions). Nor do most legislative candidates use paid campaign staff. J.A. 42-43; *see also* Randall Br. 9 (acknowledging that in legislative campaigns, use of mass media is generally limited to mailings and newspaper ads). Even when television is used, "primarily in campaigns for statewide office – it is relatively inexpensive compared to other states." Pet. App. 44a. Evidence showed that candidates could buy a thirty-second, prime-time, non-preemptible ad (the most expensive kind) on a network station for as little as $350. Ex. III:0873. Moreover, even legislative candidates can afford radio, direct mail and cable television advertising under Act 64's limits. Ex. IV:1402 (Brownell); Tr. IV:51 (Meub). A package of three thirty-second ads on CNN in Burlington during the most expensive time slot could be purchased for $45. Ex. III:0861.

direct contact between candidates and voters, including door-to-door campaigning, attending community events, and other methods of meeting voters. Tr. VII:16 (Young); Tr. IX:51 (Bristol); Ex. V:1825-1827 (Fiorillo); Tr. X:185 (Kitzmiller); Tr. IX:220-21 (Pollina); Tr. IX:129, 134-35 (Ready); Tr. II:17 (Berkey). Petitioner Brunelle distributed campaign literature by visiting all 2300 homes in his district in four days in each of his three House campaigns and said there was "no question in my mind" that the voters knew his views on the issues, although he never spent in excess of Act 64's limits. Ex. VII:2696, 2700.[29]

In the Senate, average spending by major party candidates was below the spending limits in all types of districts save for single-member districts. J.A. 87.[30] Overall, Senate incumbents spent more money than challengers in each of the three election cycles that were studied, and thus would be more affected by the limits than challengers. *Id.* Testimony by both Republicans and Democrats confirmed that Senate candidates can campaign effectively and get their messages out under Act 64's limits. Tr. VII:80 (Rivers); Tr.

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[29] Other witnesses who have run both as incumbents and challengers confirmed that candidates can run effective campaigns for the House under the limits. Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young). Petitioners cite testimony by Representative Neil Randall, an incumbent House member, that he planned to exceed Act 64's limits in order to run effectively for re-election. Randall Br. 9-10. While higher spending might well help Representative Randall fend off a challenger who would otherwise be able to outspend him under Act 64, that does not define the needs of a robust and effective campaign. *See also* Tr. IV:255-56.

[30] The most expensive district is Chittenden County, which includes Burlington and has six seats, but most successful Chittenden County candidates, both challengers and incumbents, spent less than or very close to the Act 64 limit of $16,500 (now adjusted upward for inflation). Ex. IV:1305-06, 1460. Republican challenger Peter Brownell testified that he ran an effective and winning Chittenden County campaign while spending only $11,000. Ex. IV:1349, 1353.

IX:134-135 (Ready); Tr. VIII:64 (Smith); Ex. IV:1359 (Brownell).

The VRSC Petitioners assert that an effective campaign by an "unknown challenger" requires $4,000 to $6,000 for a House seat and $30,000 to $50,000 for a Senate seat. Br. 42. But those figures are based solely on the testimony of Steve Howard, who, as a two-term House incumbent, *rejected* his challenger's request that the candidates abide by a voluntary spending limit. Representative Howard greatly outspent his challengers in his 1996 House race. Tr. IV:198-201. Nothing could illustrate better how high spending levels assist *incumbents* in defeating challengers. Moreover, Howard did not testify that effective Vermont Senate races generally required an expenditure of $30,000-$50,000, but only that *he* would have needed that amount *to defeat* his opponents in his own 1998 Senate race in Rutland County, Tr. IV:171 – an amount he was not even able to raise. Tr. IV:161. One candidate's testimony as to his own aspirational spending level does not establish the benchmark for narrow tailoring.[31]

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[31] In any event, the district court found more credible the testimony of another of Petitioners' witnesses, William Meub, who stated that he got his message out and ran a viable campaign for Senate in Rutland County in 1990 while spending $6,000-$7,000. Tr. IV:48-49, 51 (Meub). *See* Pet. App. 43a.

Petitioners' further claims, including their assertion that "Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998 (VRSC Br. 39), rely on the flawed analysis of an expert, Clark Bensen, which arbitrarily excluded all of the low-spending campaigns and was riddled with other errors and omissions. Mr. Bensen analyzed only one election year (1998), and omitted from his analysis, even in that year, 130 House candidates and 25 of the 70 Senate candidates, primarily those who spent the lowest amounts on their elections. Tr. III:90, 92. Mr. Bensen acknowledged that "as a data analyst" he "would much have preferred" to look at three election cycles, not just one. *Id.* at 90. He also admitted that he was inconsistent in his methods. He correctly subtracted from Governor Dean's expenditures a $218,000 donation he made to the Democratic Party, because Governor Dean did not spend those funds on his campaign.

With respect to statewide offices, the spending limits similarly will not impede effective campaigns. Indeed, no candidate for Governor, or indeed for any statewide office, chose to join the plaintiffs in challenging the limits.[32] Partly because television advertising is relatively inexpensive in Vermont, Pet. App. 44a, Vermont's gubernatorial campaigns are the second-least expensive in the nation. Tr. V:198-199 (Gierzynski). In the 1994-1998 period, only one candidate – incumbent Governor Dean, in 1998 – exceeded Act 64's limits. J.A. 84-86. A witness for Petitioners confirmed that Republican challenger Ruth Dwyer reached the voters and "did very well" in 1998, notwithstanding that she spent less than $253,000. Tr. IV:54 (Meub); J.A. 84.[33] Thus, the record does not support Petitioners' claim that $600,000 to $800,000 is the benchmark for an effective gubernatorial campaign. *See also* Tr. VIII:64-65 (Smith) (candidates can run effective campaigns for Governor under Act 64 limits); Tr. IX:233-34 (Pollina) (same); Pet. App. 43a (district court rejected testimony of Petitioners' witness that $800,000 to $1 million necessary for effective gubernatorial campaign).[34]

However, Mr. Bensen did not subtract similar donations by various other candidates when calculating their campaign expenditures. Tr. III:97-99. Thus, his report overstates the impact of Act 64's limits on such candidates. If a candidate is donating campaign funds to his party or to another candidate, the funds obviously were not needed to get the candidate's message out to the voters. *See also id.* at 112-14, 143-45 (acknowledging other mistakes and omissions).

[32] With respect to State Auditor only, which was subject to a $45,000 spending limit, Steve Howard claimed he would have considered a run but was discouraged by the limit, Tr. IV:177-78, but there is no evidence that he was capable of raising $45,000.

[33] In fact, the gubernatorial challengers in 1994, 1996, and 1998 all would have had *more* money to spend if Act 64 had been in place, because they could have received public financing of $300,000, an amount they were unable to raise through private donations.

[34] While Petitioners point to extra-record evidence of higher levels of spending in gubernatorial elections that occurred after the trial, the fact that a candidate spent more than the limit does not establish that effective campaigns cannot be conducted under the limit. For example, a state

The limits for other statewide offices also were tailored to allow adequate spending. Lieutenant Governor Douglas Racine testified before the Legislature that in his two bids for the office, "I found that I could run very effective campaigns, both of them, one was a losing effort, one was a winning effort, for $100,000. That's a lot of money." Ex. I:0267 (Act 64 limit was $100,000, now adjusted for inflation). The major party candidates for Lieutenant Governor spent just over $100,000 in two of the three election cycles prior to Act 64. J.A. 84-86. For statewide races below the level of Lieutenant Governor that were subject to a $45,000 limit under Act 64, the average spending by most categories of candidates was less than $30,000 in the three previous election cycles. J.A. 63. Of the few candidates for such offices who spent more than the limits, most were incumbents. J.A. 84-86.

Petitioners err in contending that the only relevant benchmark for effective campaign spending in legislative races is the handful of elections in one election year – 1998 – that were deemed "competitive" by Republican Party leaders and involved large expenditures. Naturally, the handful of highest-spending campaigns will be most affected by a spending limit, but that is nothing more than a tautology. It does not establish that spending in excess of the limits is necessary to run effective or competitive campaigns.[35]

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candidate's spending may reflect efforts to develop a fundraising network and a higher profile to assist later efforts to run for federal office, rather than any increased costs of communication. Because the facts relevant to understanding post-trial elections were not addressed through the adversary process at trial, those elections cannot properly be reviewed here.

[35] For example, four Vermont House challengers (Atkins and Cross in Chittenden 1-1, Hube in Windham 4, and Baker in Rutland 7) defeated incumbents while spending within Act 64's limits in 1998, and another four challengers (Fisher in Addison 2, Mann in Addison-Rutland 2, Lancaster in Windsor 2-1, and Kirchner in Rutland-Bennington 1) ran close races against incumbents while spending within the limits, yet Petitioners excluded all but one of those races in their list of

In fact, by focusing on only a tiny fraction of elections, Petitioners merely expose the poverty of their vision of electoral competition: one in which a handful of party leaders decide, before the campaign even begins, which small group of races will be important, while writing off any meaningful challenge to the incumbent in most races, including primaries. Vermont is not required to embrace such a distorted vision of democracy. A candidate field that has been so narrowed before a single vote has been cast is not the reflection of a healthy political system.

Moreover, the spending on "targeted" races clearly reflects the "prisoner's dilemma" described earlier – the fact that an opponent has an unlimited ability to raise funds. As Petitioners' witness explained: "[T]he other fear was . . . we did not know at the time . . . . how much money the other challenger in the race, Judy Murphy, was going to spend. . . . [T]he fear was that there would be an extraordinary amount of money spent on her campaign through donations from outside Vermont." Tr. II:77 (McNeill).[36]

Petitioners' assumption that a spending limit, to be narrowly tailored, must be set at the highest amounts ever spent by past candidates, is arbitrary and has no more merit than deeming the lowest-spending campaign the benchmark. The evidence of Act 64's narrow tailoring properly includes (but was by no means limited to) examination of overall patterns of spending across elections.[37] That evidence was

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"competitive" elections. Ex. VII:2360-2375; Vermont Secretary of State, http://www.sec.state.vt.us/results (last visited Feb. 7, 2006).

[36] In fact, at least five Republican candidates McNeill identified as potentially harmed by spending limits actually lost their election in 1998 to candidates who *outspent* them. Ex. VII:2355, Col. H; Ex. VII:2358, Col. H.

[37] While Petitioners claim that pre-Act 64 spending figures do not include any of the items that would be considered "related expenditures" under 17 VT. STAT. ANN. § 2809, they ignore the fact that the definition of "expenditure" under former 17 VT. STAT. ANN. § 2801(3), similar to Section 2809, specifically encompassed payments by "any person, committee or group authorized by a candidate" to make an expenditure.

buttressed by individual testimony of knowledgeable Vermont witnesses (including some of Petitioners' witnesses) confirming that the limits permit effective campaigns.[38]

Nor does the narrow tailoring requirement require Vermont to specify separate expenditure limits for primary and general elections. Other states similarly apply campaign finance limits without distinguishing between primary and general elections. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 13-226(b) (2006); HAW. REV. STAT. § 11-191, § 11-204(a) (2006); Wisconsin State Elections Board, Contribution Limits: Candidates for State Office 65 (2004), *available at* http://elections.state.wi.us/docview.asp?docid=1818 (last visited Feb. 7, 2006). Furthermore, in Vermont the primary is held very close to the general election – only two months apart – engendering more of a unified campaign season, which often works to the advantage of a candidate who has run in a successful primary. Pet. App. 60a; Tr. VI:85-86; Tr. VIII:71-72 (Smith). Rather than specifying one limit for the primary and another for the general election, the Vermont Legislature established the overall amount needed and gave candidates the flexibility to determine how to divide their spending. Tr. X:224-25 (Kitzmiller).

Finally, the fact that the limits apply to candidates who are entirely self-funded does not prevent the limits from being narrowly tailored.[39] While Petitioners argue that

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VT. STAT. ANN. tit. 17, § 2801(3) (amended 1997). Thus, there is clearly some overlap. Moreover, unlike the previous definition of expenditure, Act 64's "related expenditure" provision *expressly excludes* from the candidate's spending total all coordinated expenditures of less than $50, *id.* § 2809(b), as well as any expenditure of less than $100 for refreshments and related supplies at an event held to allow a candidate to meet personally with a group of voters, *id.* § 2809(d).

[38] Ex. VII:2700 (Brunelle); Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young); Tr. VII:80 (Rivers); Tr. IX:134-135 (Ready); Tr. VIII:64-65 (Smith); Ex. IV:1353, 1359 (Brownell); Tr. V:50-51 (Hooper); Tr. IX:233-34 (Pollina).

[39] None of the candidate-petitioners has alleged that he could finance a campaign in excess of Act 64's limits while relying solely on his own

spending by such candidates cannot implicate corruption or time-protection interests, campaign finance limits must apply even-handedly. A system in which most candidates face limits while a few remain free to spend unlimited amounts from their personal fortunes would raise the spectre of discrimination and would be unlikely to win public acceptance. *See* Blasi, *supra*, at 1316. If a limit on candidates' spending is otherwise supported by compelling interests, it is not unconstitutional merely because it brings within its scope some instances of spending that are less likely to pose the dangers that prompted the law. *Buckley*, 424 U.S. at 35 (upholding contribution limits although not all large contributions cause corruption).[40]

2. Less Restrictive Alternatives Are Not Available.

The Second Circuit's remand order requires Respondents to show not only that the spending limits chosen by Vermont permit effective campaigns for office, but also directs the district court to determine whether a system of voluntary spending limits with public financing would equally serve the State's interests. Pet. App. 157a-164a. To be effective, the alternative must be both plausible and feasible. *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004); *United States v. Playboy Entm't Group*, 529 U.S. 803, 815-16 (2000).

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financial resources. Accordingly, none has standing to allege that the limits are unconstitutional as applied to self-funded candidates.

[40] *Amicus* RNC argues that Vermont's spending limit is not narrowly tailored to address the State's time-protection interest because it limits candidates' spending, but does not specifically bar candidates from raising funds in excess of the spending limit. But Vermont certainly could assume that if candidates are limited in the amount they can spend, few if any will see any purpose to raising funds in excess of the limit. In past elections, when candidates have raised more than they spent, it was under a system in which no candidate knew, at the outset, what a potential opponent might be able to spend. If Vermont finds, after experience with spending limits, that candidates habitually are raising more than they are able to spend, the State can always add a provision specifically limiting the amount a candidate can raise.

Plainly, a voluntary system of expenditure limits with public financing is not an effective alternative, because in any given election any candidate who chooses to decline the public funding can thwart the compelling governmental interests served by spending limits.[41] Moreover, if a state has to set the public financing amounts high enough to assure that no non-participating candidate, no matter how well funded, would ever outspend a participating candidate, the system is unlikely to be feasible. Accordingly, no remand is required.

The Second Circuit's remand order also requires Respondents to show that higher limits would not effectuate the State's interests. Pet. App. 161a-64a. Petitioners have not sought to support that aspect of the Second Circuit's narrow tailoring inquiry. Because the spending caps allow ample communication and effective campaigning, they are "precisely targeted to eliminate" the problems that the statute sought to address without inhibiting political discussion and debate. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). Under these circumstances, an increase in the limit would be "a difference only in degree, not a less restrictive alternative in kind." *See Burson v. Freeman*, 504 U.S. 191, 210 (1992) (plurality opinion) (holding that prohibition on electioneering within one hundred feet of polling place satisfied exacting scrutiny without a showing that the one-hundred-foot boundary was "perfectly tailored"). The limits therefore satisfy the narrow tailoring requirement, and no remand is necessary.

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[41] Indeed, Act 64 provides public financing for the Governor and Lieutenant Governor races, and Vermont thus has had a *de facto* voluntary financing system since 2000, when the mandatory limits were enjoined by the district court; yet no major party candidate in the last two election cycles has chosen voluntary public financing. The collapse of the presidential public funding system in the primary election in 2004 is further evidence of the problem. *See* Briffault, *Return of Spending Limits*, *supra*, at 424-25; *see also* Alexander, *supra*, at 54-58 (explaining why voluntary public financing system is not a feasible less restrictive alternative for protecting officeholder time).

Finally, Petitioners' own proposals are contradictory and self-defeating. When Petitioners argue simultaneously that Vermont's anti-corruption interests are adequately served by lowering the contribution limits, Randall Br. 12, 35, but that the time-protection interest would be served by raising or eliminating the contribution limits, *id.* at 33-34, it is evident that they can offer no feasible alternative to spending limits.

D. As an Alternative, Buckley's Application of Exacting Scrutiny Warrants Reexamination.

In the event that the Court concludes, contrary to the foregoing, that Vermont's expenditure limits do not satisfy the requirements of strict scrutiny, sound reasons exist to revisit the applicable standard of review. For the reasons set forth in Part II of the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, which Respondents join, a test that balances the constitutional interests served by spending limits against any burdens such limits may impose on protected speech is appropriate when, as here, "constitutionally protected interests lie on both sides of the legal equation." *Shrink*, 528 U.S. at 400 (Breyer, J., concurring).

The Court may also uphold Vermont's expenditure limits as a content-neutral regulation of speech.

> The principal inquiry in determining content neutrality, in speech cases generally . . . , is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Ward, 491 U.S. at 791 (1989) (internal citations omitted). A content-neutral law is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of information. *Id.*;

see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

Ward's emphasis on a regulation's justification is significant because it specifically incorporated the analysis derived from *Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986), into the general test for content-neutrality. *See Ward*, 491 U.S. at 804 n.1 (Marshall, J., dissenting). In *Renton*, the Court upheld as content-neutral an ordinance aimed at theatres that showed movies with adult content, 475 U.S. at 43, because the ordinance aimed "at the *secondary effects* of such theaters on the surrounding community," *id.* at 47, and was thus "*justified* without reference to the content of the regulated speech." *Id.* at 48-49 (internal quotations omitted).[42]

Act 64's expenditure limitations meet the standard for content-neutrality outlined in *Ward*. They were not adopted because of disagreement with the message conveyed, and they neutrally apply to all candidates. *See also Buckley*, 424 U.S. at 39 (characterizing FECA's spending limits as "neutral as to the ideas expressed"). Of six legislative findings specific to the issue of spending limits, two relate to preserving the time of officeholders and candidates, J.A. 20 (Sec. 1(a)(1), (2)), four relate to avoiding corruption and the appearance thereof, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), three relate to promoting electoral competition, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), and one relates to democratizing the influence of money on politics, J.A. 20 (Sec. 1(a)(1)). The "predominate concern" of the Vermont Legislature clearly was not the suppression of particular views. *See*

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[42] Contrary to Petitioners' reliance on *Burson*, 504 U.S. at 197 (plurality), this Court has repeatedly reaffirmed that the government's purpose in enacting a regulation is the touchstone for determining content neutrality. *See Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-96, 310 (2000) (plurality and Souter, J., concurring in part and dissenting in part); *Turner Broadcasting*, 512 U.S. at 642; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991).

Renton, 475 U.S. at 47-48 (examining "predominate concerns" of law); *see also City of Erie*, 529 U.S. at 292 (one legitimate purpose sufficient for determination of content neutrality); *Turner Broadcasting*, 512 U.S. at 646 (examining "overriding objective" of Congress to determine content neutrality).[43]

The application of spending limits only to candidates (and not to other individuals or groups) similarly does not "reflect the Government's preference for [or aversion to] the substance of what the . . . speakers have to say." *Turner Broadcasting*, 512 U.S. at 658. Vermont's spending limits were enacted to preserve *officeholders*' and *candidates*' time and to prevent the corruption or appearance of corruption, interests that would not be served by application of the spending limits beyond candidates. *Simon & Schuster*, 502 U.S. at 122 n.* (statutes may be content neutral despite "incidental effects on some speakers but not others"). The fact that a burden falls upon political speech does not mean that the burden is more than incidental. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.23, 817 (1984). Moreover, even a law that directly regulates speech activity may be subject to intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 213-214 (1997).

Vermont's content-neutral spending limits further substantial governmental interests and those interests are

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[43] To the extent *Buckley* implicitly suggests that expenditure limits are not content-neutral, that conclusion was based on the specific "equalization" interest asserted in support of the spending limits in FECA and is not applicable to Vermont's candidate spending limits, which rest on distinct interests. *Compare Simon & Schuster*, 502 U.S. at 126 (Kennedy, J., concurring in the judgment) (describing *Buckley*, in part, as "striking down content-neutral limitations on financial expenditures") *with Turner Broadcasting*, 512 U.S. at 657-58 (characterizing independent expenditure limitations in *Buckley* as content-based to the extent they were justified on equalization grounds).

unrelated to the suppression of free expression. *See supra* Part I(B). Given the findings of both courts below that Vermont's spending limits fully permit candidates to communicate their ideas to the voters and run effective campaigns, Pet. App. 42a-44a; *id.* 152a-57a, the record here demonstrates that the burden on speech is only incidental. *See supra* Part I(C)(1). This finding is in contrast to FECA's spending limits, which "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19.

It is for this reason, as well, that the spending limits leave open ample alternative channels of communication. That is implicit in the fact that Act 64 establishes a limit, not a ban, on campaign spending, and allows for spending at levels which candidates in the past have found wholly adequate for their campaigns. *See Ward*, 491 U.S. at 802. The incidental burden is "no greater than . . . essential" because Vermont's spending limits promote "substantial government interest[s] that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675 (1985).[44]

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[44] Because Vermont's spending limits are constitutionally permissible based on the interests canvassed *supra* at Part I(B), the Court need not revisit *Buckley*'s conclusion that the interest in equalizing the ability to influence elections does not justify expenditure limits. Nevertheless, Respondents agree with those *amici* who contend that an interest in equality is sufficiently compelling to satisfy strict scrutiny review. *See* Br. of *Amici* States and Br. of Equal Justice Society *et al.* When the political marketplace becomes the special province of the winners in the economic marketplace, *Buckley*'s very goal of securing "'the widest possible dissemination of information from diverse and antagonistic sources' " in political campaigns, 424 U.S. at 49 (citations omitted), is defeated. A spending limit that encourages broader participation while permitting candidates to amass the resources they need for effective advocacy of their views thus furthers, rather than restricts, First Amendment goals. *See Shrink*, 528 U.S. at 401 (Breyer, J., concurring) (citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

To the extent the Court also views *Buckley* as precluding the constitutionality of spending limits based on any of the interests discussed

II. The Second Circuit Correctly Rejected Petitioners' Challenges To Vermont's Regulation of Campaign Contributions

This Court in *McConnell* and *Shrink*, applying its prior ruling in *Buckley*, upheld limits on contributions to electoral candidates on a standard that defers to the expertise of elected legislators. The Second Circuit in this case correctly applied this Court's precedents in upholding contribution limits tailored to the particular circumstances of Vermont's electoral environment.[45] Petitioners' claims are a reprise of arguments repeatedly rejected by this Court, and should once again be rejected.

This Court has consistently upheld contribution limits against First Amendment challenges. *McConnell*, 540 U.S. at 224; *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *Shrink*, 528 U.S. at 395-96; *Buckley*, 424 U.S. at 29. Under this Court's precedents, such limitations are not subject to strict judicial scrutiny. Rather, legislatures may regulate contributions to combat corruption and the appearance of corruption in electoral politics unless the restriction is "so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" *Shrink*, 528 U.S. at 397 (quoting *Buckley*, 424 U.S. at 21). The question under the First Amendment is whether the legislative measure is "so radical" in effect as to render "political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Courts have no "scalpel to probe" the amount at which a contribution limit should be set to achieve its purpose. *Buckley*, 424 U.S. at 30; *Shrink*, 528 U.S. at 388

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supra at Part I.B, Respondents respectfully request that the Court revisit *Buckley* in that regard.

[45] Candidates for State Representative or local office may accept up to $200, candidates for State Senate or county office may accept up to $300, and candidates for statewide office may accept up to $400. 17 VT. STAT. ANN. § 2805.

("[T]he dollar amount of the limit need not be 'fine tun[ed].'") (quoting *Buckley*, 424 U.S. at 30).[46]

Substantial deference is owed to legislative determinations regarding contribution limitations, as legislators are far more familiar with varying local political conditions that determine whether a limit is appropriate. *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."). The legislature accordingly is not required to compile a detailed evidentiary record justifying the particular lines it draws. *See Shrink*, 528 U.S. at 393.[47] "[D]ifferences in [the] level [of contribution limits] from state to state should reflect democratic choices, not court decisions." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000) (internal quotations omitted).

The lessened standard of First Amendment scrutiny applicable to limitations on contributions also reflects the minimal effect of such limits on associational and speech

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[46] *Shrink* thus rejects the view of certain lower courts (*Day* v. *Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994); *Russell* v. *Burris*, 146 F.3d 563, 571 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998)) that *Buckley* applied a narrow-tailoring standard to contribution limits.

[47] Contrary to this settled law, Petitioners would require extraordinary evidentiary showings by legislatures. In arguing that a legislature must present hard "evidence of pre-access demands for contributions conditioned on granting access," VRSC Br. 10, Petitioners conflate "activities which arouse suspicions," *Shrink*, 528 U.S. at 390 (internal quotations omitted), with evidence of actual corruption, an approach that would render meaningless the substantial government interest in combating the appearance of corruption, *e.g.*, *Shrink*, 528 U.S. at 389 (upholding Missouri contribution limits adopted to combat what the public perceived as "politicians too compliant with the wishes of large contributors"). Petitioners similarly ignore *Shrink* by arguing that there was "no evidence at trial that [pre-Act 64] limits failed to deter corruption." Randall Br. 20. This is untrue (*see infra* this Part), but even if it were not, it ignores that the Vermont Legislature has a compelling interest in combating the *appearance* of corruption.

rights. *McConnell*, 540 U.S. at 137, 141; *Shrink*, 528 U.S. at 386-388; *Buckley*, 424 U.S. at 20-26. *Cf.* Pet. App. 42a (even "[s]mall donations are considered to be strong acts of political support in this state"). It also reflects the vital governmental interests furthered by contribution limits: deterring corruption, preventing the appearance of corruption, and assuring public confidence in government. *McConnell*, 540 U.S. at 143-45; *Beaumont*, 539 U.S. at 154; *Shrink*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28.

This Court accordingly has sustained two federal contribution limitation schemes in *McConnell* and *Buckley*. In *Shrink*, it also rejected a First Amendment challenge to a Missouri statute that included $1,075 contribution limits for statewide offices. 528 U.S. at 384-85. Relying on *Shrink* and *Buckley*, courts of appeals repeatedly have rejected challenges to state contribution limits set at varying levels.[48]

The Vermont Legislature determined that its limitations were appropriate to the unique circumstances of the state after months of painstaking deliberation and hearing testimony from 145 witnesses. Ex. I:0187 *et seq.*; Ex. II:0412 *et seq.* In addition, at trial, numerous witnesses testified that, under the limits in place prior to Act 64, candidates' reliance

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[48] *See Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1088, 1092 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004) ($400 per election for Governor and Lieutenant Governor, $200 for other statewide offices and $100 for any other public office); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002) ($300 per election for at-large elections and Mayor and $100 for ward elections), *cert. denied*, 537 U.S. 1160 (2003); *Daggett*, 205 F.3d at 452, 459 ($500 for Governor and $250 for all other candidates; $500 and $250 limits for PACs, committees, corporations, or associations); *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000) ($525 per election for State Senator or other office with electorate of 100,000-250,000, and $275 for State Representative or other office with electorate below 100,000). *See also Fla. Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256, at *3, *5, *7 (M.D. Fla. Mar. 20, 2000) ($500 per contested election for legislative elections in which candidates spend average of $108,000 for House seats and $250,000 for Senate seats).

on large campaign contributions continued to undermine public confidence in Vermont's political system.[49] This testimony included the observations and experiences of several current and former state officeholders.[50] Several of Petitioners' own witnesses testified to the same effect. Pet. App. 36a-37a; *see also* Tr. IV:66-72 (Meub); Tr. II:207 (Patch); Tr. IV:220 (Howard); Tr. IV:259 (Randall); Ex. VII:2706 (Brunelle); Tr. III:25-26 (Kuusela). *See also* Pet. App. 37a (district court finding that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence").

The district court further found that the contribution limits adopted by the Legislature were calibrated to address donations "considered suspiciously large" by the Vermont public, and that gave rise to the corrosive perception of corruption. Pet. App. 59a. *See* Tr. VII:18-21; Tr. VII:80; Tr. IX:226; Tr. VIII:23-24; Ex. III:0747, 0757, 0783-0784, 0791-0793, 0798, 0804 (newspaper articles indicating public suspicion resulting from large contributions permitted under previous contribution limits). Many of Petitioners' own witnesses testified to that public perception. *See* Tr. IV:254 (Randall) ($1,000 contribution from an individual could give appearance that candidate was bought or owned by contributor); Tr. III:25 (Kuusela); Ex. VII:2672-73 (Landell); *see also* Tr. II:201 (Patch) (contributions over one hundred dollars are very large).[51] Indeed, under Vermont's prior

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[49] *See* Tr. VII:147-57; Tr. IX:175-76, 193-98; Tr. V:183-84; Tr. VIII:23-26, 28-38; Tr. IX:56-58; Tr. X:162-63; Ex. V:1843-44, 1847; Tr. VII:41-42.

[50] Tr. X:161-62 (Kitzmiller); Tr. VIII:23-26, 39-40 (Smith); Tr. IX:56-58 (Bristol); Tr. VII:41-42 (Young). This included testimony linking donations to specific legislative actions. *See* Tr. VII:72-74 (Rivers on favorable treatment given to donor seeking tax exemption); Tr. V:55-56 (Hooper).

[51] Petitioners cite polling numbers purporting to show that the public associates corruption only with much larger amounts such as $20,000. VRSC Br. at 9 n.6. The numbers cited, however, were not from a poll of Vermonters, but from a national poll. Tr. VI:135.

limits of $2,000 per election cycle, a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign. J.A. 87-88 (average House campaign spent less than $2,000 and State Senate campaign averaged less than $7,500).

Senator Rivers acknowledged that she gave special consideration to a donor who had contributed between $500 and $1,000 in past campaigns when the donor sought a tax exemption. Tr. VII:72-74. Senator Ready testified that slate industry donors who made $500 donations appeared to get preferential consideration in a development permit law. Tr. IX:88-95, 100-04; Ex. III:0787; Ex. V:1765; Tr. V:23-30; *see* Tr. VII:42 (Young) ($1,000 contributor will be "listened to"). In light of the evidence, the district court properly concluded, applying *Shrink*, that Act 64's lowered contribution limits were appropriate in the circumstances of Vermont, Pet. App. 55a-62a, and the court of appeals was unanimous in affirming that conclusion, Pet. App. 168a-171a, 194a. Petitioners' argument that Vermont is obliged to make a greater evidentiary showing because its limits are supposedly "exceedingly low" (Randall Br. 44) ignores the body of evidence establishing that the limits are in fact both calibrated to the context of Vermont and accord with the perception of the state's citizens.[52]

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[52] Petitioners' *amici* claim that Act 64's contribution limits improperly seek to equalize access to candidates and officeholders in a manner inconsistent with *Buckley*. Br. of *Amicus* Center for Competitive Politics 12-16; *see also* Br. of *Amicus* Sen. McConnell 13 -18. *Amici*'s analysis is suspect. Certainly, a system in which access is for sale is troubling at least in part because citizens stand on a vastly unequal footing in their ability to secure a politician's responsiveness in that manner. But that does not mean that the goal of deterring corruption and undue influence is somehow tainted by the reality of voters' unequal giving power. To the contrary, *Buckley* and subsequent cases recognize that government has a compelling interest in deterring the threat of "politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389; *see Buckley*, 424 U.S. at 28 (government entitled to address the "attempts of those with money to influence governmental

Nor do Vermont's limits impede effective advocacy. As discussed *supra*, under *Shrink* and *Buckley*, contribution limits that advance the State's anti-corruption interest are valid unless they produce a "dramatic[ally] adverse effect on the funding of campaigns." *Shrink*, 528 U.S. at 395. The district court, relying on substantial evidence in the record, properly held that Act 64's individual contribution limits had no such effect. The court relied on testimony from a substantial number of witnesses, including state legislators, candidates, and campaign consultants, and on witnesses who had already conducted political campaigns under the Act's contribution limits. That finding is entitled to deference. *Shrink*, 528 U.S. at 396.

The district court's findings reflect Vermont's small population and intimate campaigning style. Vermont is the second-smallest state in the Union in terms of its population. In contrast, Missouri, whose contribution limits this Court approved in *Shrink*, has close to ten times as many people as Vermont.[53] It is predictable, therefore, that campaigns in Vermont would be significantly less expensive than in other parts of the country.

Partly due to the "relatively inexpensive cost of television advertising in the state," statewide candidates can raise sufficient funds to effectively advocate under Act 64's contribution limits. Pet. App. 155a (citation omitted). Even under Petitioners' inflated benchmark for an effective gubernatorial campaign by an unknown challenger, VRSC

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action" through broader means than anti-bribery laws). Vermont citizens were rightly troubled when their Governor admitted that "money does buy access," Ex. III:0902, and nothing in *Buckley* or subsequent cases calls into question the propriety of responding to that concern.

[53] *See, e.g.*, U.S. Census Bureau, State & County Quickfacts (Missouri), http://quickfacts.census.gov/qfd/states/29000.html (last visited Feb. 3, 2006) (Missouri population is 5,595,211); U.S. Census Bureau, State & County Quickfacts (Vermont), http://quickfacts.census.gov/qfd/states/50000.html (last visited Feb. 3, 2006) (Vermont population is 608,827).

Br. 42, a candidate could raise the funds with $400 donations from 1500-2000 individuals or entities, a number equal to less than .33% of Vermont's population (and donors are not required to be from Vermont). If spouses each contributed the maximum, donations from 750-1000 households would suffice. As the evidence canvassed at Part I(C)(1) establishes, effective campaigns can in fact be conducted with far less spending than the amounts suggested by Petitioners.

Senate and House candidates also can raise sufficient funds for their campaigns under Act 64's limits, as the district court expressly found. Pet. App. 40a. The average Senate campaign of less than $7,500, J.A. 87, would require only twenty-five donations. Even at five times the average, the campaign could be funded with 125 donations of $300 (assuming the candidate contributed no funds of her own). In House races, which averaged under $2,000 in spending, J.A. 88, ten $200 contributions would suffice, and at five times that amount, fifty donations would be needed. Evidence from the 1999 Burlington mayoral contest, held under Act 64's $200 limit, showed that both candidates ran fully effective campaigns; even the losing candidate, the court noted, "[b]y his own statements, [had run] an effective campaign." Pet. App. 41a.

Despite the district court's findings, supported by a substantial record, that candidates can advocate effectively under Act 64's contribution limits, Petitioners assert that Vermont's limits impermissibly fail to focus on a small group of "targeted" races. This Court's precedents impose no such requirement. In calibrating its regulation of contributions to ensure that candidates remained able to advocate effectively, the Legislature looked to historical contribution patterns in Vermont, including "cost-per-voter statistics, the level of limits that have survived constitutional challenge elsewhere, the experiences of persons running for office, costs of campaigning, types of campaigns, history of reform, and media reflection of general public sentiment." Pet. App. 56a-

57a. That is comparable to the methodology employed in *Buckley* and *Shrink*, in which this Court approved a broad examination of previous elections in order to assess the likely impact of limits. *Shrink*, 528 U.S. at 395-97; *Buckley*, 424 U.S. at 22 n.23, 26 n.27. Moreover, the contribution limit this Court approved in *Buckley* applied to every federal election, from North Dakota to New York, regardless of the competitiveness or cost of elections in the relevant jurisdiction.

More broadly, Petitioners' approach of setting limits based on the most expensive elections would frustrate Vermont's anti-corruption interest. If Vermont were to set its contribution limits based on the most expensive races highlighted by Petitioners, candidates in the less costly elections could finance their entire campaigns with only a few contributions. Consequently, if Petitioners' rule were adopted, Vermont would be forced to allow corruption or its appearance to infect nearly all of Vermont's legislative races. Consistent with *Buckley* and *McConnell*, this Court should not hamstring the Vermont Legislature by adopting Petitioners' rule.

Petitioners contend that Act 64's contribution limits preclude effective advocacy by challengers. This Court has already rejected nearly identical arguments. *Shrink*, 528 U.S. at 389 n.4 (noting that "*Buckley* squarely faced" such claims). The trial record in this case confirms this Court's understanding. Professor Gierzynski found no systematic difference between the effect of Act 64's contribution limits on incumbents and non-incumbents. J.A. 51-52. In nearly every legislative race that Gierzynski examined prior to the Act's taking effect, either incumbents had raised more money in amounts over the limits than had challengers or the difference was minimal. *Id.* 72, 75.

Further, both Petitioners' and Respondents' witnesses testified that incumbents have greater access to large contributors than do challengers. Tr. IX:127 (Ready); Tr. IV:252 (Randall). Empirical studies of state contribution

limits support this conclusion.[54] The record evidence thus accords with *Buckley*'s observation that a contribution limit would have "the practical effect of benefiting challengers as a class" to the extent incumbents are more likely to attract large contributions. *Buckley*, 424 U.S. at 32.

Further undermining the claim that campaign reforms inherently reflect incumbent self-dealing is the fact that contribution limits have been enacted in many jurisdictions not by the legislature but by referenda and initiative, and are often challenged by the very incumbents whom such limits are alleged to benefit. *Shrink*, 528 U.S. at 382 (observing that Missouri reform law with lower contribution limits was enacted by initiative and later replaced by legislative enactment containing higher limits); *Eddleman*, 343 F.3d at 1087 (reform law approved by voters); *City of Akron*, 290 F.3d at 815-16 (reform law approved by voters; two incumbent city council members sued); *Daggett*, 205 F.3d at 450, 472 (reform law approved by voters; plaintiffs challenging law included incumbent State House and Senate representatives).[55]

CONCLUSION

The decision below should be affirmed to the extent it upheld Act 64's limits on contributions by individuals, parties, and political committees, and its presumption treating certain expenditures by political parties and committees as "related expenditures." It should also be affirmed to the

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[54] Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, POL. RES. Q. (forthcoming 2006), manuscript at 1, *available at* http://www.uky.edu/~keom0/paper/disparity_Eom.pdf (last visited Feb. 7, 2006) (if anything contribution limits can work to reduce the bias that traditionally works in favor of incumbents).

[55] Petitioners join the more extensive discussion of Act 64's contribution limits, and its separate discussion of the Act's political party limits and rebuttable presumption of coordination, set forth in Parts III, IV, and V of the Sorrell Brief.

extent it held that Vermont's expenditure limits are supported by compelling governmental interests. The decision below should be reversed to the extent it ordered a remand to the district court for further consideration of whether the spending limits are narrowly tailored, and the Second Circuit should instead be instructed to enter judgment for Respondents, Cross-Petitioners as to the constitutionality of Vermont's spending limits. In the alternative, if the Court determines that additional factual development is necessary to determine whether the spending limits are appropriately tailored, the Court should affirm the judgment remanding that issue to the district court.

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In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM SORRELL, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Argument

I. The State Has Failed To Demonstrate a Corruption Problem in Vermont That Would Justify Such Low Contribution Limits.

The State correctly points out that "[t]he gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." Sorrell Br. 30 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950). Here, however, the contribution limits fail this test, since the gravity of the evil, corruption, when discounted by its probability, which the record has shown is non-existent, makes Vermont's exceedingly low contribution limits wholly unnecessary.

The State presents a few instances which they erroneously claim shows perceived undue influence of contributions, and no evidence of any actual corruption. Instead, Respondents' Briefs are filled with general, conclusory statements and hyperbole and cite not one witness who is able to name a specific officeholder corrupted by low contributions. Instead, the evidence shows that Vermont is considered a "clean" state in regard to elections and is certainly not the most corrupt state in the Nation that would be necessary to justify the lowest contribution limits in the country.

Because of this lack of actual evidence, Respondents attempt to bolster their claim by two techniques, by repetition and by intermingling the sparse trial testimony with numerous citations to newspaper articles[1] and

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[1]The mere fact that a reporter or editor publishes an article alleging corruption does not prove that there is even a reasonable perception that such corruption exists.

> If we were to allow the charges of journalists automatically to create a presumption that corruption exists or that people believe corruption exists, a group of writers, no matter how unlikely the tales they tell, could rescue statutes otherwise

to various exhibits containing out-of-court statements not subject to cross-examination. Such non-sworn-to material should be given little weight in determining whether Vermont is a state plagued by corruption and should not be allowed to substitute for the proof the State is obligated to present. This lack of proof occurs in spite of the fact that Vermont was then operating under the prior, much larger, $2000 per election cycle contribution limits. It follows, then, that the State has not shown that the new $200-400 contribution limits are justified. In any event, Vermont is only claiming "privileged access" and the record shows that all Vermont citizens enjoy access to their elected officials, so there is nothing "privileged" about it.

A. The specific examples Respondents cite in an attempt to show corruption are merely broad allegations that prove nothing.

Respondents cite a seemingly impressive array of legislative misconduct, made to appear more impressive because the examples are cited repetitiously throughout their Briefs. A closer look at these few instances (and they are all strikingly similar in their lack of substance) reveals that they are nothing more than unfounded allegations of wrongdoing. For instance, the State's oft-repeated tobacco check example, Sorrell Br. 3, 6, 19, 21,

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abridging the free speech of those not employed by traditional, established media outlets. This cannot be the law.

Democratic Party of United States v. National Conservative Political Action Committee, 578 F. Supp. 797, 831 (D. Pa. 1983).

If newspaper articles alone suffice to show a problem with corruption or even the appearance of corruption, then "the appearance of corruption is not merely a blank check, but an endlessly refilled bank account for those who seek greater regulation." Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, CATO Supreme Court Review, 2002-2003, at 187, 200.

consists of tobacco checks in the amount of *$40* given to officeholders *after* defeat of a tobacco-related bill. Tr. VII-63. This utterly fails to prove corruption; rather, it is an example of a well-known political truth – contributors give to candidates with whom they agree. As Representative Karen Kitzmiller complained, "the tobacco industry . . . freely give[s] contributions to people *who support their views*," but she could not say "whether votes are changed because of that." Tr. X-180 (emphasis added). If this is corruption, then candidates will be forced to accept contributions only from those with whom they disagree, with a resulting shortage of likely donors. Furthermore, contributions of $40 remain lawful even after the imposition of Vermont's "laughably low" limits, so the contribution limits do not solve this "problem" of contributors donating to candidates who support their views. Moreover, no regulation can prevent this "problem," unless contributions are outlawed altogether.

Another example the State offers as "proof" of corruption is the bottle bill vote. Sorrell Br. 2, 6, 19, 44; VPIRG Br. 12. For all of the discussion and citations to the incident, however, the worst Senator Ready could testify to was that bottle industry contributors were "trying to dispose party leadership and the people who are running for office in a friendly way toward their issue." Tr. IX-109. The bill did not pass and an old farmer, one of her constituents, called to tell her he could not believe it was not passing. It was "frustrating" to him. Tr. IX-110. Finally, Alice Bassett stated that the bottle bill "got nowhere" and that the wine lobby was too strong, but when questioned about whether the wine lobby had actually contributed to any members, she said, "I can't say that they were paid. They probably were not." Ex. II, E-0426.

Senator Ready testified about the slate quarry exemption matter, Sorrell Br. 3, 6, 20, 45; VPIRG Br. 12,

44, and in at least 19 pages of testimony, as to the $500 contributions only found it "odd" that committee members studying the issue would be given contributions by quarry owners. She conceded that the officeholders were not corrupt – "I can tell you [members of the committee studying the issue] John Bloomer, Curt McCormack, none of these people is for sale. They are people that have distinguished records, and a high moral standard." Tr. IX-94-95. "And I want to be very, very clear that I am not saying here that senator A, B, C, or D or representative A, B, C or D took money and therefore had a specific vote." Tr. IX-104.

The State also points to a vote on a bill that would have allowed optometrists to administer eye drops. Sorrell Br. 19; VPIRG Br. 12-13. The State quotes Peter Smith bemoaning the fact that "there were lobbyists and individual doctors . . . all over the statehouse." Tr. VIII-41. Smith admitted that he did not know specifically of any contributions given to senators over the eye drop issue, nor did he recall receiving such contributions himself around the time of the vote and said he voted his conscience. Tr. VIII-86-87.

Instead of evidence of perceived or actual corruption, the Respondents' Briefs are full of conclusory statements and hyperbole. For instance, the State claims that Plaintiffs' witnesses "recognized the public's concern over the corrupting effect of money in politics." Sorrell Br. 7. What the State fails to explain is that William Meub, the one witness cited by the State for that proposition, testified that the public might perceive such a problem with contributions of "an *unlimited* amount." Tr. IV-66-67 (emphasis added).

None of the incidents cited establishes the existence or even the perception of corruption. Thus, the State has failed to meet its burden to show that prevention of real or apparent corruption is a compelling interest in Ver-

mont that would justify such low contribution limits.

B. The record demonstrates that, without evidence, corruption from such low contribution limits should not be presumed.

Without record evidence of corruption resulting from contributions this low, corruption should not be presumed. The relationship between contributions and corruption continues to be controversial. Stanley C. Brubaker, *The Limits of Campaign Spending Limits*, 133 Public Interest 33, 46 (1998) ("[P]olitical scientists consistently find that the interests of constituents, the concerns of political parties, and the politician's philosophy have more influence on how he votes than do mere campaign contributions."). "Literally decades of studies have consistently failed to find evidence that campaign contributions purchase special favors on any type of systematic basis." Smith, *supra*, at 187, 197-98 (citing Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. Econ. Perspectives 105, 113, Table 1 (2003) (summarizing results of 36 major studies)). "Supporters of the 'contributions as corruption' thesis continue to produce anecdotal evidence of specific episodes of 'corruption.'" *Id.* at 198 (citation omitted). "Anecdotal evidence, however, is generally viewed by the Supreme Court as inadequate to support the infringement of a fundamental right such as speech." *Id.* (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 370 (2001)).

Dr. Lott, Yale University Law School research scholar with a Ph.D. in economics, has written over ten papers on the topic of why incumbent politicians vote the way they do. Tr. III-170. He testified that there is "basically no effect" of contributions on the voting patterns of incumbent officeholders from contributions largely in the $30,000 range. Tr. III-176. He studied 980 congressmen over a period of 15 or 16 years. Tr. III-175. He researched

how those politicians voted during their last term in office when they were not faced with the threat of losing contributions if they voted against the wishes of their contributors, and whether they voted differently than they had previously. Tr. III-172-73. He controlled for whether the incumbent was running for a different office, would be engaged in lobbying, was up for a government appointment, and even whether an officeholder's child was involved in political activity or lobbying. Tr. III-173. His conclusion was that politicians leaving office "continue to vote exactly the same way as they did previously." Tr. III-173. Other papers that have studied the effect of contributions on voting behavior have looked only at correlation, not causation. Tr. III-178.

C. Officeholders in Vermont freely give access to their constituents.

Access is freely given to Vermont citizens. State witness Sen. Ready is an excellent example. She is so accessible that she even has people come into her unlocked house and leave notes on her kitchen table. Tr. IX-165. She has never told any constituent that she was unwilling to talk to them, Tr. IX-166, and, apparently, is available even at her son's soccer games. Tr. IX-167.

Legislators in Vermont will generally see anyone that wants to see them. Tr. VII-28. "Legislators [in Vermont] are accessible . . . even on the floor of the house as they are voting . . . . [A]ccess really isn't worth anything in Vermont because it's prevalent . . . . Citizens see their legislators on a daily basis so they wouldn't have to pay for that access." Tr. IV-180-81.

Of course, access may come in different levels. Access may depend on the size of the district, "the degree of influence of the constituent, whether the person is helpful or always comes with complaints, how often they attempt that access, how conscientious the legislator is, how proficient they are, maybe even the size of the last

election win. If you win in a squeaker, perhaps those legislators would be more responsive than the ones who win by a landslide." Tr. V-118 (Hooper). It is normal human nature for candidates to respond differently to constituents: there is nothing corrupt about this reality.

D. The public perceives Vermont as clean.

David Wilson, whose legislative committee testimony the State favorably cites, Sorrell Br. 2-3, expressed that "the link between a contribution and an outcome in Vermont . . . [has] not yet morally crossed the line where, again, we have the types of problems that I think we've all been reading in the newspapers that exist in other states and certainly in Washington." Ex. II, E-511-12.

Alice Bassett, cited for the allegation that the influence of money helped defeat a bottle bill, Sorrell Br. 2, said in that testimony that "My feeling is having been in the legislature for ten years, that Vermont's lawmakers are – it's a very clean state. I don't think much – many shenanigans go on. In fact, very, very few. I think my pitch for campaign finance reform is more an example to other states where there are many, many problems. I think a good, strong campaign finance reform bill would do a lot to set an example to other states." Ex. II, E-0425.

Neil Randall, another witness cited by the State, when asked if he thought the general public in Vermont has some concern over contributions, stated that he did not see "any case" of cynicism in Vermont, but that he would have a "personal concern" about a contribution from a single contributor that financed a high percentage of his campaign. Tr. IV-258-59. It is true that large contributions can pose the risk of real or apparent corruption, but far from true that meager $200-400 donations pose the same risk.

In fact, Vermonters do not seem to desire the extreme measures of Act 64. William Meub, gubernatorial candidate at the time of trial, testified regarding the people's

perception in Vermont that Act 64 "is clearly perceived as the kind of overregulation and dampening effect, and people have told me to do whatever I can to fight this legislation. So, when they know what it is, they're opposed to it. I haven't found anybody in any group when I have mentioned it, and I have asked for a show of hands, what do people think of it, I haven't found anybody who supports it." Tr. IV-72.

II. The Contribution Limits Are Too Low to Survive Constitutional Scrutiny.

The State claims that "it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded." Sorrell Br. 32. Petitioners wholeheartedly agree. It is *excessive* contributions that can pose the risk of corruption, but Vermont's original $1,000 per election contribution limits were not excessive. However, Vermont's new contribution limits are so "laughably low" that no risk of corruption could reasonably be perceived, as explained above. But they are also unconstitutional because they are too low to allow candidates to mount effective campaigns.

The State seeks to justify its contribution limits based on their effect on the "average" campaign. Sorrell Br. 40 ("Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates."). However, "[t]he average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." P.A. 236 (Winter, J., dissenting). Any meaningful assessment of the effect of these contribution limits are on those candidates who actually mounted some sort of campaign, particularly competitive ones.

Thus, Plaintiffs' expert Bensen specifically chose to analyze the races that were contested in any meaningful sense, using the $500 minimum required for reporting as

the basis. In the senate races he studied, those who were not required to report were uncontested or only lightly contested. Tr. III-37. There are races where campaigns do not make a difference to the outcome of a race. The State, however, misplaced its focus in analyzing the limits' effects on even uncontested races, which are irrelevant in determining whether contribution limits allow candidates to amass the resources necessary for effective advocacy, the test set out by this Court.

In addition, the State cites the percentage of contributions affected by the limits, rather than the amount of funds. Sorrell Br. 39 (10% of contributions received affected). Since the issue is whether the limits could have a "severe impact on political dialogue," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the focus must be the total amount of campaign *funds* that candidates would lose, not the percentage of contributions lost.

III. The State Has Failed to Prove That Its Purported Compelling Interests Justify Limiting Candidates From Spending Money on Their Own Campaigns.

A. The State has failed to prove that preventing real or apparent corruption justifies the expenditure limits here.

Respondents seek to transform the interest in preventing corruption posed by large contributions into an interest supporting expenditure limits. Sorrell Br. 22 ("spending limits directly counter political corruption and its appearance"); VPIRG Br. 6 ("*Buckley* embraced" the anti-corruption interest). However, this Court only "embraced" that interest as to contribution limits, and specifically rejected the interest for expenditure limits. Moreover, *Buckley* held that any "interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." 424 U.S. at 55. As a

result, "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

The State concedes as much, asserting that spending limits deter corruption by explaining that corruption includes the "use of *donations*," "the wishes of large *contributors*," and "favors that may be given in return for generous *support*," all references to alleged corruption stemming from *contributions*, *not* expenditures. Sorrell Br. 21 (citations omitted) (emphasis added). Thus, the real claim is the dreaded "arms race," where candidates and officials "fearing their opponents' war chests and concerned about being outspent . . . typically grant monied interests *excessive* portions of their limited time." Sorrell Br. 23-24 (emphasis added). The record, however, does not support this contention.

The record, when it does refer to any specific amounts of time fundraising, actually points to brief periods. For instance, Sen. Ready testified to spending an "afternoon" fundraising. Tr. IX-151 ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door."); *see also* Tr. IX-167 (Sen. Ready implying that she would "have lunch with or . . . meet with on a Saturday morning . . . [or] spend half of my son's soccer game talking to about their business" with some constituents).

Donald Hooper, cited at VPIRG Br. 17 n.16, indicated that under the prior contribution limits he would spend evenings "hustling campaign money." Tr. V-119. However, in his 1994 run for Vermont secretary of state, he had only 68 contributors who gave over $100. Ex. VI, E-1952-82. Even if he spent one hour per contributor, that would amount to less than 70 hours for his whole statewide campaign, certainly not an "inordinate" amount of time with these contributors.

Finally, the State claims that spending limits will

"relieve the pressure to afford special interest groups undue access and influence." Sorrell Br. 18. Respondents have failed to prove how spending limits will have any effect whatsoever on the giving of "special interest groups." Rather, it is likely that Vermont's spending limits, along with the draconian related expenditure provision, will cause candidates to rely *more* heavily on bundled contributions. Candidates will be reluctant to spend one dime of their meager allocated budget on fundraising costs and thus will be eager to accept the low-cost bundled contributions from "special interests."

Furthermore, *Buckley* specifically addressed "bundling" favorably. The Court, in upholding contribution limits, reasoned that the limits focus on the problem of large contributions while leaving persons free to continue to support candidates, albeit in a limited way. *Buckley*, 424 U.S. at 28. This preserved "the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents." *Id.* at 29 n.31. Thus, this Court viewed citizens' ability to band together to accentuate their contributions as a positive, not a negative.

B. The interest in incumbent time-protection is not proven.

Even if one sets aside the explicit incumbent-protection nature of this claimed interest, the demands of fundraising by incumbents have not been proven to be "inordinate." And, if it were true, as the State claims and the court below found, that "the demands of seeking campaign dollars *often* force officials and candidates to engage in fundraising rather than attending to their public duties," Sorrell Br. 12 (emphasis added), then there would be ample proof of such specific instances. However, there is not a single example of any incumbent having neglected one of their official duties as a result.

Furthermore, since this claimed interest is essentially

that challengers should be limited to the fundraising time that is convenient for incumbents to do, there needs to be evidence from incumbents on how much time they have available, aside from campaigning and performance of their official duties, for fundraising and how much could be raised during this time. There is no such evidence.

C. The interest in electoral competition has not been demonstrated to support mandatory expenditure limits.

Vermont's spending limits would not promote electoral competition as Respondents contend. Instead, the limits would devastate electoral competition by depriving challengers of funds they need to overcome the advantages of incumbency. As State expert Gross acknowledged, "most research which looks at the effect of spending on the outcome of elections indicate that on a dollar per dollar basis, challengers receive greater benefits from spending than incumbents do." Tr. X-81; *see also* Tr. III-163; Tr. IV-172.

Gross nonetheless thought this impact on challengers could be overcome under some circumstances because, "[i]n some ways, incumbents have a lot more to lose by spending limits simply because, particularly at the congressional level, they tend to have so much more money than challengers . . . if you have $800,000 and your opponent has $550,000, if you impose a $500,000 limit, you have more to lose." Tr. X-84.

However, in Vermont challengers often outspend incumbents so that challengers have more to lose in absolute dollars by spending limits than do incumbents. In Vermont house races, the average spent by house non-incumbents exceeded that spent by incumbents in each of the three election cycles before trial. Ex. III, E-991. Similarly, three incumbent statewide candidates were outspent by their challengers in 1998, Ex. III, E-987-88, and 5 of the 6 highest spenders in the last two campaigns

for senate from Chittenden County have been challengers. Ex. IV, E-1305-06.[2]

Thus, the record demonstrates that Vermont's expenditures limits will not only *not* promote electoral competition; they will devastate it.

IV. The Spending Limits Are Not Narrowly Tailored.

The State comments that "the district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont," calling those claims 'wholly unreasonable.'" Sorrell Br. 9. However, this Court reviews constitutional claims *de novo* and is not bound by the district court's findings.[3] Thus, this Court must independently examine the facts and the record demonstrates that the expenditure limits here are much too low.

The record clearly supports that these amounts are necessary for effective statewide campaigns. First, Kathy

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[2]Moreover, the small reduction in the expenditure limits for incumbent candidates does not alleviate this problem of incumbent advantage. "[T]here's no possible depreciation rate that I have found or anybody else has found that would be large enough to make that small 15 percent or ten percent reduction sufficient to offset this – this huge amount of reputation that the incumbent has already relative to the challenger." Tr. III-170 (Dr. Lott).

[3]This Court requires that "the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). Specifically, and as the Second Circuit's opinion below recognized, "the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review." P.A. 111a. This is especially true in the First Amendment context. *See Bose Corp. V. Consumers Union*, 466 U.S. 485, 501 (1984); *Sullivan*, 376 U.S. at 284-86.

Summers, campaign manager for gubernatorial candidate Ruth Dwyer, testified that Dwyer would need between $600,000 and $800,000 in her race. Tr. IV-81; VRSC Br. 19, 40, 42. Second, spending in the last three election cycles have proven that the district court's judgment was wrong. In the 2004 Vermont gubernatorial race, Jim Douglas spent $681,662 and Peter Clavelle spent $502,537. *See* Randall Br. Appendix. In 2002, Douglas spent $1.1 million and Doug Racine spent $723,907. *Id.* In 2000, Howard Dean spent $946,443 and Ruth Dwyer spent $899,581. *Id.* Third, even in 1998, two years before trial, Dean spent $657,065, more than twice the limits. *Id.* Clearly Vermont's statewide expenditure limits are woefully inadequate.

Further, the State claims that the expenditure limits for legislative candidates are adequate, since spending in House races were "less than the Act 64 spending limits *on average*," VPIRG Br. 27 (emphasis added), and since Senate "*average* spending" was less than the limits "in all types of districts save for single-member districts." *Id.* at 28. While *average* spending of *all* legislative candidates is an improper measure of the effect of these limits on candidate campaigns, spending since the district court's decision has proven it wrong. House *average* spending was $2,528 in 2000, $1,998 in 2002, and $2,883 in 2004 and Senate *average* spending in *all* races was $14,458 in 2000, $11,114 in 2002, and $12,463 in 2004. The Institute on Money in State Politics, *2000 State Election Overview* 5, *2002 State Elections Overview* 4, *2004 State Elections Overview* 4, available at http://followthemoney.org/Research.

V. There Is No Evidence That Parties in Vermont Are Corrupt by Acting as Conduits for Contributions from Donors to Candidates.

The only evidence offered by the State that parties "sell access to and influence over candidates and officials

in return for contributions" Sorrell Br. 44, is (1) that political parties in Vermont offer access to candidates at fundraisers, and that lobbyists are present at fundraisers, *id.*, (2) that industry donors give money to parties, *id.* at 44-45, and (3) that one of the Plaintiffs "shifted his donations to his party because of Act 64's limit on candidate contributions." *Id.* at 46. These examples prove nothing and fall far short of the evidence in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). That case found that the national Democratic Party used "tallying" to connect donors to candidates and also found that donors were informed that they could contribute to candidates via a contribution to the party. *Id.* at 459.

VI. Approval of These "Laughably" Low Contribution and Expenditure Limits Requires This Court to Accept a Radically Different View of Candidate Campaigns, the Compelling Governmental Interest in Preventing Corruption, and Ultimately the First Amendment Itself.

As the State's amici make clear, this case is not about the peculiarities of Vermont, but about a radical new vision of candidate campaigns, of the compelling governmental interest in preventing corruption, and of the First Amendment itself. This new vision is fundamentally at odds with the record, American experience and any reasonable interpretation of the First Amendment.[4]

A. Candidate Campaigns.

Respondents' favorite term for candidate campaigns is "arms race," Sorrell Br. 7, 17; VPIRG Br. 3, 10, 11, 15, 21, which is an analogy to military armament spending,

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[4]For a concise explanation of and justification for this new vision, *see* Ronald Dworkin, *The Curse of American Politics*, 43 The New York Review of Books (1996),available at http://www.lnybooks.com/articles/1388. For a similarly concise refutation, *see* Brubaker, *supra*.

primarily during the Reagan administration. VPIRG Br. 11 n.8 ("[C]andidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War."). While a nostalgic phrase for some, *see* Burt Neuborne, *Is Money Different?*, 77 Tex. L. Rev. 1609 (1999), most now recognize that the military buildup during the Reagan administration was not mindless, but a key factor in the collapse of the Soviet Union.

Similarly, candidate fundraising and spending is also not mindless. *See* VPIRG Br. 11 ("[W]hile it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more.") (emphasis in original). First, the State readily concedes that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country," Sorrell Br. 8 ("Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43."); VIPIRG Br. 30 (same); *id.* at 23 n.22 (describing House races as "very low-budget races"), because of "Vermont's small population and intimate campaigning style." *Id.* at 45. Nor do these low cost campaigns generate much fundraising pressure. VPIRG Br. 44 (Under the prior contribution limits, "a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign.").

Second, there are reasons for the rising costs of campaigns, including population growth, the expanding scope of government, the level of competition between the political parties, and the changing means and conditions of effective campaigning. Vermont has experienced this growth, as set forth above, particularly in competition between the political parties, with the Republicans

seizing control of the Vermont House in 2000 and the governorship in 2002 and 2004.

Third, campaign spending is necessary for voter education and has that effect. The American people's political knowledge base is abysmal. Only 33% of adults over 26 know which political party controls their state legislature. National Conference of State Legislatures, *Citizenship: A Challenge for All Generations* 7 (2003), available at http://www.ncsl.org/public/trust/citizenship.pdf. Increased campaign spending produces knowledge increases across the population spectrum. John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Politics 757 (2000); John J. Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Politics 916 (2001).

Fourth, challengers need financial resources to overcome the advantages of incumbency and they benefit more than incumbents by such spending. Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Science Rev. 469 (1978); Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972-1982*, 47 Pub. Choice 7 (1985); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 Am. J. Pol. Science 334 (1990).

So "arms race" is "a pejorative method of describing competition over voter persuasion, the very heart of the democratic process," P.A. 281a (Winter, J., dissenting), and "refers to contested elections in which challengers spend resources to run serious campaigns." *Id.* at 247a.

B. The Compelling Governmental Interest in Preventing Corruption.

The compelling governmental interest in preventing corruption is based on this Court's finding that "sometimes *large* contributions will work actual corruption of

our political system," and that there is "a *corresponding* suspicion among voters." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000) (emphasis added). The State, however, would have this Court reject this formulation, in favor of a much broader one, in two ways: (1) by defining a "large" contribution to be a de minimis one, and (2) by separating perceived corruption from actual corruption.

First, the State claims that the contribution limits here "are directed at amounts considered 'suspiciously large.'" Sorrell Br. 14; *id.* at 9, 38 (same); VPIRG Br. 43 (same). It has already been demonstrated, by a review of the evidence, that there is no evidence that these contribution limits address amounts that are *suspiciously* large. VRSC Br. 8-9. But these contribution limits are not large by any measure. In 1974, Congress adopted the $1,000 per election contribution limits approved in *Buckley*. Adjusted for inflation, this limit would be $3,961.46 in today's dollars, Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov?cgi-bin/cpicalc.pl (last visited Feb. 20, 2006), or $7,962.92 for the election cycle. This is twenty times larger than Vermont's highest limit. In 1974 dollars, Vermont's highest contribution limit, adjusted to be per election, would be worth $50.48, *id.*, versus *Buckley's* approved limit of $1,000. $50.46 would have been considered small in 1974, not, by any measure, large.

Second, the State claims that its contribution limits may be justified by perceived corruption, absent actual corruption from contributions at these low limits. Sorrell Br. 33, VPIRG Br. 41. But it is well established that there is an underlying suspicion about politicians in America that precedes our founding and continues to today. The American National Election Studies, *Are Governmental Officials Crooked 1958-2004*, http://www.umich.edu/~nes/nesguide/toptable/tab5a_4.htm (last visited Feb. 20,

2006) (finding that from 1958-2004 24% to 35% of the American people believed that "quite a few" politicians were crooked, and only 26% to 10% thought that "hardly any" were). If perceived corruption were enough, government would have unbridled power to regulate campaigns.

C. The First Amendment.

Finally, Respondents ask this Court to reverse decades of its jurisprudence and find that the expenditure limits are not content-based regulations of speech, and are thus subject to lower scrutiny. VPIRG Br. 36-39. In *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), this Court found that limiting candidates' speech to certain pre-approved subjects is content-based. Since it is only expenditures "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates," 17 V.S.A. § 2801(3), that are subject to the expenditure limits, "by any commonsense understanding of the term," they are content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429(1993)."Indeed, were . . . expenditure limitation[s] unrelated to the content of expression, there would have been no perceived need for Congress [in enacting the expenditure limits struck in *Buckley*] to 'equalize the relative ability' of interested individuals to influence elections." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (quoting *Buckley*, 424 U.S. 1, 48 (1976)).

VII. The Presumption of Coordination Is Unconstitutional.

The State argues that Section 2809(d)'s mandatory rebuttable presumption of coordination is constitutional because, under Vermont law, the presumption merely shifts the burden of *production*, not the ultimate burden of *persuasion*. Sorrell Br. 48. Even if this is true, Section 2809(d) is still unconstitutional, because this Court's cases teach that mandatory rebuttable presumptions

violate due process even if the ultimate burden of persuasion remains with the State.

Vermont Evidence Rule 301(c)(1) provides that in cases of civil presumptions, the jury is required to find the existence of the presumed fact, "[i]f the evidence of the basic fact is such that no reasonable juror could find the nonexistence of that fact and if the party against whom the presumption operates has not met the production burden imposed on him" by the civil presumption. This Court's cases, however, hold that, in the criminal law context, shifting the burden of production through the use of a mandatory presumption violates Due Process. *See County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157-58 and n.16 (1979). Similarly, the First Amendment require that "speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (stating that civil presumptions affecting "important liberties cognizable under the Constitution" are accorded the same Due Process scrutiny as criminal law presumptions). The presumption here violates this requirement.

Conclusion

This Court should remand with direction to award judgment to Plaintiffs with respect to 17 V.S.A Sections 2805(a), 2805a, 2809(d) and for further proceedings consistent with this Court's decision.[5]

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[5]The State is not entitled to a reversal of the decision below remanding the expenditure limits to the district court to determine if they are narrowly tailored, Sorrell Br. 50, because this was not raised in their Conditional Cross-Petition.

Respectfully submitted,

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NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

A. Buckley Properly Rejected Expenditure Limits As an Unconstitutional Restraint on Core Political Speech

Despite Respondents' best efforts to argue otherwise, Act 64's expenditure limits cannot be upheld without rejecting the core holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).[1] This Court should reject that invitation for three reasons. First, *Buckley's* recognition that expenditure limits directly restrict core political speech that lies at the heart of the First Amendment was correct. Second, Respondents' principal arguments largely mirror arguments that were considered and rejected in *Buckley*. Third, respondents' effort broadly to redefine the state's asserted interest in dictating the appropriate amount of political speech directly conflicts with core First Amendment values.

Throughout their briefs, Respondents describe Act 64 as if it were only about money and not about speech. Nothing could be further from the truth. Under Act 64's broad definitions, a candidate who has reached her expenditure limit is prohibited from any manner of campaigning. She cannot spend another dollar to carry her message forward or to respond to criticisms leveled by opponents, the opposing political party, advocacy groups or the media. The restriction applies to both cash and in-kind expenditures. Thus, for example, once a candidate has reached the statutory spending limit, Act 64

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[1] Unless otherwise indicated, the term "Respondents" refers to both the State Respondents and the Intervenor Respondents.

prohibits the candidate from even driving across town to a political rally.

This direct restraint on speech contravenes not only the holding, but the reasoning, of *Buckley*. It is not up to the government to decide how much speech is necessary for candidates and voters in a political campaign. That is a decision for the candidates and voters to make in our constitutional democracy. Indeed, the prohibition on election-day editorials invalidated in *Mills v. Alabama*, 384 U.S. 214 (1966), represents a "lesser intrusion on constitutional freedom" than a limitation on the amount a candidate can spend during an entire campaign. *Buckley*, 424 U.S. at 50.

Act 64 does something this Court has "never allowed": the Act "prohibit[s] candidates from communicating relevant information to voters during an election." *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002). By focusing on candidate speech, moreover, Act 64 has two perverse results. It deprives voters from hearing the most important voice in any political campaign — namely, the voice of the candidate. And, as a result, it magnifies the importance of so-called special interest spending, further undermining the state's asserted interest in limiting the influence of such groups on the electoral process. *Buckley*, 424 U.S. at 45.

In addition, expenditure limits inevitably blur the line between discussions of issues by candidates, particularly incumbents, and election speech. Candidates are intimately tied to public issues involving legislative proposals and government actions. *See, e.g. Buckley*, 424 U.S. at 42. Although candidates campaign on these issues, they are no less entitled to engage in the public discussion of those issues simply because they are also running for office. *Id.* at 52-53. "[T]he notion that the special context

of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Republican Party of Minn.*, 536 U.S. at 781. There are, as well, serious definitional issues in determining what speech by incumbents will count as an expense under Act 64. *See* P.A. 214a-218a.[2]

Respondents' failure fully to answer these fundamental criticisms of Act 64 is fatal under the exacting scrutiny required by *Buckley*, 424 U.S. at 44. The Court's cases involving speaker-based and content-based restrictions on candidate and electoral speech consistently apply the same exacting standard. *See, e.g.*, *Republican Party of Minn.*, 536 U.S. at 774-775; *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 785 (1978). Act 64 cannot meet this standard because it is not supported by a compelling state interest, and it is not narrowly tailored. For Act 64's spending limits to meet this exacting standard,

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[2] Respondents' argument that spending limits will not further entrench incumbents is simply not credible. Indeed, Vermont understood this would be the case, which is why slightly reduced limits for incumbents were adopted. The inadequacy of this fix is discussed in our opening brief at 16 n.11. More fundamentally, "everyone knows this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage." *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part); *see also Buckley*, 424 U.S. at 56-57 ("[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.").

Respondents "must demonstrate that it does not unnecessarily circumscribe protected expression." *Republican Party of Minn.*, 536 U.S. at 775 (citation, internal quotation marks, and alteration omitted). Act 64 fails this test because it unnecessarily restrains core political speech in a way that is barely tailored to serve the interests purportedly advanced by the Act.[3]

Buckley remains grounded in core First Amendment principles that this Court has never disavowed; indeed, they are the very principles that undergird our democracy. "[T]he concept that the Government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Thus, in discussing the limitation on independent expenditures, the *Buckley* Court rejected the argument that either the State's interest in preventing corruption, or the ancillary interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, could justify the burden on core First Amendment expression. Act 64 runs afoul of this principle by attempting to introduce financial parity into

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[3] The Intervenor Respondents urge the Court to abandon the exacting scrutiny required by *Buckley*, and to uphold the expenditure limits under the analysis applicable to content-neutral regulation of speech applied in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This argument underscores a fundamental misconception that the Court addressed directly in *Buckley*. Discussing its decision in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court explained that "[t]he decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use." *Buckley*, 424 U.S. at 18 n.17. By contrast, the Court explained, "[FECA's] dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information." *Id.* The same distinction applies to Act 64 because it operates as a direct restraint on speech.

the election process in a way that directly restrains speech. If Vermont wants to accomplish this goal, it can do so by providing a meaningful public funding alternative that does not suppress speech.

Turning next to the expenditure limits imposed on candidates from personal or family resources, the *Buckley* Court explained:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53.

As the Court stated in summarizing its position, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. That principle is not limited to self-funded candidates, and cannot be reconciled with the expenditure limits imposed by Act 64.

Finally, the *Buckley* Court noted that "[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions," not the aggregate financial resources available to the candidate's campaign. *Id.* at 55-57. The Court then concluded that the interest in alleviating the corrupting influence of candidate dependence on large

contributions is fully served by contribution limits and disclosure provisions. *Id.* at 56-57.

> Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.

424 U.S. at 56 (footnote omitted).

Despite this unambiguous holding, Respondents nonetheless argue that Act 64's spending limits can withstand the exacting scrutiny required by *Buckley*. To do this, Respondents grossly exaggerate the presence and appearance of corruption in Vermont and urge this Court to extend the definition of corruption in a way that moves beyond the rationale that is *Buckley*'s very foundation. That effort is both constitutionally and factually flawed.

B. Act 64's Expenditure Limits Are Not Supported by Any Compelling State Interest

1. *Expenditure Limits Are Neither a Necessary Nor Appropriate Response to Respondents' Overstated Claims of Political Corruption in Vermont*

Respondents grossly exaggerate the presence of "corruption" in Vermont. Respondent's grim view of the Vermont political scene would be unrecognizable to many Vermonters. It is not supported by the record, nor does it make intuitive common sense. Vermont is a small state with the second smallest legislative districts in the

country. House districts are often contiguous with the boundaries of a single small town, with a gross population of about 4000 and perhaps 2600 registered voters. Representatives serve in the legislature part-time; most have other jobs; you can speak with them over coffee in the local diner. Vermont's candidates and officials are not "locked away" in some office, as Respondents would have us believe; rather, both plaintiffs' and defendants' witnesses testified that door-to-door campaigning was the norm in legislative elections, and that Vermonters expected to meet candidates at "grass roots" events. Moreover, because of Vermont's small population, it has more "government per capita" than a large state and it is therefore relatively easy for "ordinary" individuals to have access to their elected officials. Vermont's Statehouse has no security check points and legislative hearings are posted on a user-friendly web site so interested citizens can attend. *See http://www.leg.state.vt.us/schedule/schedule2.cfm.*

Despite Respondent's shrewd emphasis on anecdotes suggesting that large contributors are disproportionately influential, elected officials who were witnesses for the State actually testified that they often returned constituents phone calls and readily provided access to "ordinary" voters. Elizabeth Ready, who was then a State Senator and has since served as Auditor of Accounts, testified that she provided access to any constituent. Voters in her district would leave notes on her kitchen table in her Lincoln home, which she leaves unlocked. Tr. IX – 165-66.[4] Similarly, Cheryl Rivers,

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[4] Despite her grass roots credentials, Ms. Ready vastly exceeded the Act 64 spending limit in the 2000 Auditor's race. *See http://vermont-elections.org/elections1/campaign_finance_history.html.* She served as State Auditor until 2004 when she was defeated

who was a State Senator at the time and has since run for Lieutenant Governor, testified that she would return the phone call of a homeless person before that of a large donor. Tr. VII – 106.[5]

Moreover, while Respondents use the terms "unlimited cash" and "unlimited campaign spending" over and over again in their briefs,[6] the record belies the rhetoric. Indeed, Respondents concede that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country." *Brief of Respondents Sorrell et al.* at 8. Vermont ranked 49th in spending in gubernatorial campaigns across the country. J.A. 49. If anything, the record shows that campaign spending in Vermont has been "restrained," not "unlimited." As such, the "arms race" posited by Respondents is a myth.

Similarly, Respondents have miscast or exaggerated the several claimed examples of improper influence set forth in their briefs. At the outset, it must be noted that if there were outright, egregious examples of corruption in Vermont it certainly would have been

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by political newcomer Randy Brock. Brock significantly outspent Ready in 2004, *see id.*, but despite the alleged "arms race mentality," Ms. Ready must not have believed it was necessary to spend as much as her challenger. *See Brock Wins Auditor*, The (Montpelier-Barre, VT) Times Argus (Nov. 2, 2004) (race was "shaped by questions about Ready's resume").

[5] Ms. Rivers similarly exceeded the Act 64 limits by more than double in her run for State Senate in 2000. *See http://vermont-elections.org/elections1/finance_search.html.*

[6] Respondents Vermont Public Interest Group et al., use the term "unlimited" as a modifier for "spending" or "fundraising" twenty-two times in their brief. The term appears in similar usage numerous times in the brief for Respondents Sorrell et al.

presented at trial. Instead, as examples, Respondents claim that the wine lobby and beverage companies succeeded in defeating an expanded bottle bill, in spite of public support for the bill. They assert similarly that the slate industry pushed through certain regulatory changes in the state's land use regulations after making contributions to committee members.[7] Finally, Respondents point to representatives of the tobacco industry who distributed checks at the Statehouse shortly after a vote on a bill affecting tobacco interests.[8]

In none of their examples have Respondents shown that the contributor's influence was in any way "improper." Rather, it is in the nature of politics that candidates will be influenced by their supporters and sometimes vote in a way that produces the political outcomes the supporter favors. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). In the absence of evidence that *large* contributions are being deployed to exert "undue" influence, there is nothing invidious about this type of responsiveness. "Democracy is premised on

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[7] The largest contribution cited by Respondents was a $500 contribution to members of a Senate committee considering legislation affecting that industry. Tr. II – 92. Such contributions were perfectly legal at the time, and are hardly egregious given that the new limits would permit industry groups to contribute $300 to each committee member.

[8] In fact, these contributions were all less than $100. Respondents also allege that then-Governor Dean met with representatives of the Monsanto Corporation while refusing to meet with members of a group of farm advocates on the same issue. Respondents mislead the Court by failing to set out the complexities surrounding the bovine growth hormone debate, which may well have influenced the Governor's decision on with whom he was willing to meet.

responsiveness." *Id.*; *see also Brown*, 456 U.S. at 56 ("We have never insisted that the franchise be exercised without taint of individual benefit...").[9]

Finally, much of Respondents' briefing is addressed to the public's distrust, apathy, and cynicism about the political process. The suggestion, however, that campaign spending is the cause of the public's malaise and that Act 64 will somehow cure it is surely short-sighted and lacks any understanding of history. Public cynicism and distrust of politicians is ancient. *See, e.g.*, Babylonian Talmud, Pirkei Avot 2:3. As such, the State has overplayed its hand; Respondents have greatly exaggerated the presence of "corruption" in Vermont while at the same time seriously understating the harm Act 64 will cause the political process as we know it. Rather than curing a "distorted political process," Act 64 will stifle core political speech and association.

2. *The State's Desire to Limit the Time Spent Fundraising Is Inadequate to Justify These Expenditure Limits*

Respondents and some *amici* note the increasing demands placed on fundraising in congressional elections.

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[9] "Access in itself...shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis in law or fact to say that favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also id.* at 259 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[Providing access to one's allies] is in the nature of politics — if not indeed human nature — and how this can properly be considered 'corruption' (or 'the appearance of corruption')...is beyond me.").

As we show in our opening brief at 16, 33-34, these concerns do not pertain in Vermont. Given the relatively modest sums spent on Vermont elections, especially in legislative elections, fundraising cannot be considered a significant concern. In any event, Act 64 actually makes fundraising more difficult because the expenditure limits were adopted in tandem with diminutive contribution limits. Limiting the size of individual contributions necessarily increases the amount of time that must be spent raising campaign funds. In addition, by applying the contribution limits equally to political parties and associations, the State has thwarted the ability of these organizations to consolidate the contributions of many individual supporters in a way that would lessen the time candidates spend fundraising. Of course, a generous and meaningful system of public finance would alleviate any remaining time-protection concerns.

C. Act 64's Expenditure Limits Are Not Narrowly Tailored

Quite apart from whether the spending limits further the interests they seek to advance, they are not narrowly tailored. No remand is necessary because *Buckley* has already established that contribution limitations and disclosure requirements are the "primary weapons" against the reality or the appearance of improper influence. *Id.* at 58. *Buckley* also established that public financing may be conditioned on the agreement to comply with specified spending limits. *Id.* at 57 n.65. Because Vermont has not tried any of these less speech-restrictive alternatives, Act 64 is not narrowly tailored.

There is no basis in the record to conclude that the State's interests in preventing corruption will not be

adequately served by reasonable contribution limits. Even if Act 64's contribution limits are set aside by this Court because they are unreasonably low, the record does not support the conclusion that the pre-existing limits, in combination with the State's disclosure provisions, are insufficient to address the danger of candidate dependence on large contributions. If the State believes these options are inadequate, despite the lack of record evidence, it remains free to adopt a meaningful public financing system. This option has the advantage of advancing the State's interests without suppressing core political speech. In their brief, the State Respondents refer to the failure of voluntary spending limits without mentioning that these limits were part of a pre-Act 64 system that did not provide the incentive of public financing.

Respondents claim that Act 64's spending limits are "precisely targeted" and will not harm candidates because they allow for "effective advocacy." But, as Respondents concede, Act 64's limits were set by looking toward "average" spending in previous elections, where reports were filed under the old law.[10] The problems inherent in relying on past averages are set out in our opening brief at 7-12, and 35-37. The amount of campaigning that gets done in any election — and hence the amount of spending — will vary by candidate, year,

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[10] Despite lengthy legislative hearings, Act 64's spending limits were not precisely tailored. The State did not employ a careful calculation or a proper statistical analysis that weeded out the highest and lowest spending races, or even make a reasoned judgment as to the amount thought proper for robust debate. Instead, the limits are merely set to approximate "average" (and here the term is not meant in its technical, mathematical sense) spending. This is not the narrow tailoring required by the First Amendment.

and district. In general, however, Act 64 will prevent candidates in state-wide contests[11] and in large multimember senate districts from communicating their message to voters. Candidates in elections that are hotly contested will be similarly stymied, as high spending races often involve important or controversial issues of public policy and intense public involvement.[12]

Removed from the statistics and abstractions, it is easy to see how these spending limits will harm many candidates, and a remand is not required to reach that conclusion. The $2000 limit will seriously impede many House candidates from running effective campaigns. As the record shows, most House candidates do engage in all manner of grass roots campaigning, including going door-to-door and attending community forums. *Brief of Respondents Sorrell et al.* at 8-9. Under Act 64's regulatory scheme, however, going door-to-door does cost money. The use of a car — necessary in Vermont's rural districts — must be accounted as an expense. Most candidates give out a brochure when they go door-to-

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[11] Spending in gubernatorial elections has vastly exceeded Act 64's limits, both before and after its passage. For example: 1986: Peter Smith $482,236, Madeline Kunin $478,294; 1988: Michael Berhardt $441,473, Madeline Kunin $639,863; 2000: Howard Dean $946,443, Ruth Dwyer $899,581, Anthony Polina $355,412; 2002: Jim Douglas $1,124,519, Doug Racine $723,907, Con Hogan $265,192. *See* Appendix at 1a (chart of spending in Vermont gubernatorial races from 1986 to 2004).

[12] The 2000 gubernatorial race was such an election. Governor Howard Dean had recently signed civil unions into law and his challenger, Ruth Dwyer, opposed the measure and urged her supporters to "Take Back Vermont." Road signs with the "Take Back Vermont" message sprung up throughout the State, and many still remain. Governor Dean and Ruth Dwyer each *tripled* the Act 64 spending limit in that race. *See supra* note 11.

door, particularly since many constituents may not be home. Tr. I – 103-104. Designing and printing a decent brochure for all the households in a district costs $350-650. Printing just 100 yard signs costs about $500. Postcard mailings may run between $600 and $900 per mailing, when the costs of design, printing and postage are factored in. Tr. IV – 150-176.

Accordingly, if a candidate buys yard signs and prints a brochure to distribute while going door-to-door, Act 64 limits him to sending out only one postcard. He cannot send two, and probably cannot afford much in the way of newspaper advertisements — even in inexpensive local papers.[13] This is why most of the witnesses testified that it cost more than $2,000 to run an *effective* House campaign, with estimates running from $3,700 to $4,000-$6,000. Tr. IV – 227-40; *Id.* at 156-171. In objective terms, this is not a lot of money. It simply allows a House candidate to buy yard signs, place a couple of ads in the local paper, print a brochure, and send out some mailings. Act 64's $2,000 limit prevents a House candidate from doing even this — and the problem is magnified if the candidate has a primary. Thus, Respondents are wrong to brush aside this evidence by claiming that these races represent the extremes and focus only on "targeted" races. This is simply what it costs to run an active, competitive, effective campaign.

II. VERMONT'S LIMITATIONS ON INDIVIDUAL AND PARTY CONTRIBUTIONS TO CANDIDATES ARE NOT CLOSELY DRAWN TO SERVE A SUFFICIENTLY IMPORTANT GOVERNMENTAL INTEREST

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[13] At the time of trial, a quarter page ad in *The Burlington Free Press* cost $1,448. Ex. V, E-1888-1897.

A. Even Allowing for Legislative Discretion, Act 64's Contribution Limits Are Unreasonable and Unjustified

Contribution limits must be "closely drawn" to serve a "sufficiently important interest." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-388 (2000) (citation and internal quotation marks omitted). Thus far, the only sufficiently important governmental interest identified by the Court is the avoidance of corruption or appearance of corruption that flows from *large* campaign contributions. *Id.* at 388. The evidence necessary to make this showing need not be as specific as that which would be required to sustain a direct limit on speech (such as expenditure restrictions), but where, as here, the record fails to disclose any evidence that large contributions are routinely made, the State's burden is not satisfied. This is because the justification for contribution limits stems not from campaign contributions *per se*, but from the potential for corruption attributed to *large* campaign contributions. The State's evidence on this threshold issue is extremely thin and largely misdirected.

Indeed, the record is barren of any evidence of objectively large contributions prior to Act 64. Spending was reasonably restrained in most races, and the press did a good job of exposing questionable practices. *See Brief of Respondents Sorrell et al.* at 35-39; Tr. IX – 95-96; Tr. VII – 112. Moreover, neither *Buckley* nor *Shrink* can be read to support the view that mere public cynicism of lobbyists and their activities can justify the type of stringent limits at issue here.

Lacking evidence of corruption under pre-existing limits or of a regime of large contributions, the State Respondents argue that they should not be required to

wait, in Vermont, until actual corruption occurs. Rather, Respondents urge, the legislature is justified in relying on evidence from other states or from the federal arena to justify draconian restrictions in Vermont. Citing *Shrink*, the Respondents essentially argue that the danger of real corruption is so inherent in the political system that they need not prove its actual existence. *Shrink* does not go so far. The fact that contribution limits are subject to diminished First Amendment scrutiny does not mean that they are subject to no scrutiny at all.

Moreover, even if only a scintilla of evidence is required to justify some level of contribution limits, the legislature still has an obligation, when it drastically reduces existing limits, to narrowly tailor the revised limits to fit the current circumstances. *Shrink* instructs that contribution limits be "closely drawn" to serve the interests they purportedly advance. 528 U.S. at 387-88. The idea that a candidate would be unduly influenced by a contribution from a single contributor of $200, $300 and $400 is counterintuitive and not supported by the record. Rather, the limits were set primarily to reduce overall spending, using averages that include even uncontested races, and incorporating irrational and unsupported features — including the per-cycle counting rule, and the wealthy family exception.[14] There is simply no excuse or corruption rationale for enforcing the limits on an election-cycle basis when the evidence shows that this practice will plainly disadvantage candidates who have exhausted their base of contributors to win the party

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[14] Under the Act, campaign contributions from "immediate family" members are not subject to any limitation. The Act strangely defines "immediate family" members as persons related within the "third degree of consanguinity." At trial, even Defendants' attorneys did not know the definition of "third degree of consanguinity."

nomination and must identify new contributors to finance the general election. Whenever a candidate must face an opponent in the general election who did not have a primary opponent, the disadvantage cannot realistically be overcome. Tr. II – 185-89; Tr. IV – 177-78; Tr. IV – 27-34. Respondents fail to respond to these objections, except to press the State's bottom-line argument that it has virtually plenary power to regulate campaign contributions.

B. Political Parties Should Not Be Treated As If They Were Single Individual Contributors

In treating political parties and political committees as if they were individual contributors, moreover, the limits trample the weighty associational interests at stake by restricting the rights of individuals who come together for a common purpose. Instead of reining in the "special interests" and industry groups that concern the Respondents, Vermont's new limits will choke-off "clean" money from the very sources that clearly pose a lesser risk of corruption. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour boost of resources in a close election. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

Moreover, Respondents' reliance on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), is misplaced. In that case, this Court sustained regulation of party-coordinated expenditures against an argument that all party limits were unconstitutional. *Colorado II* does not stand for the

broader proposition that political parties can be regulated as if they were single individual contributors. As the district court recognized, "Political parties speak with a different voice than individuals." P.A. 76a. With Vermont's $200-$400 election cycle limits and the related expenditure rule, parties will be unable to run coordinated "get out the vote" campaigns with candidates, share mailing lists, allow paid staff to assist candidates, or, in short, to engage in any of the typical (and decidedly non-corrupt) activities they have previously done. The district court struck down these low party contribution limits, finding that "[f]or the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past." P.A. 76a.

III. THE FIRST AMENDMENT DOES NOT PERMIT VERMONT TO TREAT INDEPENDENT EXPENDITURES AS CONTRIBUTIONS

Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. Under this "Related Expenditure" provision, these independent expenditures are regarded as the candidate's own speech and counted as both contributions to the candidate and expenditures by the candidate — subject to the relevant limitations. It is axiomatic that Supreme Court precedents prohibit limitation of independent expenditures. *See Buckley*, 424 U.S. at 45-47; *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*") (plurality opinion); *id.* at 627 (Kennedy, J., concurring in the judgment and dissenting in part). Because of the constitutional difference between independent expenditures and "contributions," it is not constitutionally

permissible for the Vermont to presume that the former is the latter. Moreover, treating "related expenditures" as contributions to the candidate is quite restrictive, as a political party will use up its allotted $200-$400 contribution limit quickly and then be prohibited from making any other direct, in-kind, or "related" contributions to the candidate.

For the first time in this litigation, the State Respondents now claim in their brief that the presumption "comes into play only if the matter is brought to court" and is "merely an evidentiary presumption." *Brief of Respondents Sorrell et al.* at 48. Such assertions fly in the face of the statute, the Vermont Secretary of State's official guidance,[15] and the position Respondents have taken throughout this litigation. Political parties, committees, PACs and candidates are all required to report spending and contributions at specified times and on forms promulgated by the State. 17 V.S.A. §§ 2803, 2811, 2821-23, 2831. If a political party makes an expenditure that benefits six or fewer candidates, it is "presumed" to be a "related" expenditure. 17 V.S.A. § 2809(d). This is part of the *definition* of a "related" expense, not, as the State now asserts, merely part of a procedural rule for litigation. As such, the plain language of the statute would require the party to report the contribution to the candidate, and for the candidate to report the same as a contribution and expense.

The state thus grossly underestimates the chilling effect of the "related" expenditure provision. While the presumption can be rebutted, both the candidate and party are presumed to have violated the law whenever a party

[15] *See http://vermont-elections.org/elections1/2005CFGuide1129rev.pdf* at 13-15.

makes an expenditure over the $200-$400 contribution limits to benefit six or fewer candidates. Recent statutory amendments give the Attorney General additional investigative powers to enforce these provisions. 17 V.S.A. § 2806a. The candidate will be forced to expend her limited resources to disassociate from independent spending over which she has no control.[16] Those unwilling to risk prosecution by the State — or suits by their opponents — will be effectively silenced.

CONCLUSION

For the reasons stated herein, in our opening brief and in the briefs of the consolidated Plaintiffs, the judgment below should be reversed.

Respectfully Submitted,

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[16] The State Respondents now suggest for the first time that the costs of defending against such prosecution or investigation may not count as an "expenditure." *See Brief of Respondents Sorrell et al.* at 26 n.15. This flatly contradicts the plain language of the statute and the Vermont Secretary of State's "authoritative construction." *See http://vermont- elections.org/elections1/2005CFGuide1129rev.pdf* at 11 (no difference between a political party's administrative expenses and any other expenses).

APPENDIX

Chart Showing Spending in Vermont Gubernatorial Elections from 1986-2004

Available at http://vermont-elections.org/elections1/campaign_finance_history.html

SPENDING IN VERMONT GUBERNATORIAL ELECTIONS 1986-2004

1986	Peter Smith	$482,236
	Madeline Kunin	478,294
1988	Madeline Kunin	639,863
	Michael Bernhardt	441,473
1990	Richard Snelling	447,479
	Peter Welch	281,541
1992	Howard Dean	253,528
	John McClaughry	131,407
1994	Howard Dean	180,145
	Thomas Morse	113,426
1996	Howard Dean	$124,975
	John Gropper	46,241
1998	Howard Dean	657,065
	Ruth Dwyer	249,188
2000	Howard Dean	946,443
	Ruth Dwyer	899,581
	Anthony Polina	335,412
2002	Jim Douglas	1,124,519
	Doug Racine	723,907
	Con Hogan	265,192
2004	Jim Douglas	681,662
	Peter Clavelle	502,537

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IN THE

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Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Respondents.

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 53 national and international labor organizations with a total membership of nine million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

The Vermont Campaign Finance Law ("VCFL"), see 17 V.S.A. § 2809(a), like the Federal Election Campaign Act ("FECA"), see 2 U.S.C. § 441a(a)(7)(B)(i), and the campaign finance laws of many states enforces a rule that activity that is coordinated with a candidate is treated as an in-kind contribution to that candidate. As a plaintiff in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), and as an *amicus curiae* in other courts, *see, e.g., Federal Election Commission v. Christian Coalition, Inc,* 52 F. Supp. 2d 45 (D.D.C. 1999), the AFL-CIO has addressed issues of coordination regulation in order to protect its ability and that of other labor organizations to engage with legislators and elected executive branch officials and advance the interests of workers and their families in the public arena. Because those officials are often or always "candidates" under applicable campaign finance law, it is vital to distinguish between the exercise of the right to petition, which is core First Amendment activity, and conduct comprising coordination with a candidate, which, as a form of contribution, enjoys less First Amendment protection and is subject, under FECA and many state campaign finance laws, to either strict source prohibitions (including as to labor organizations), limits (including as to labor organization-sponsored political committees), or both.

It is just as vital for the AFL-CIO, other labor organizations and their political committees to distinguish between coordination with a candidate and independent electoral expression, which is core First Amendment speech, and to protect those who engage in electoral activity from overly restrictive standards as to what conduct comprises coordination. The case at bar presents a challenge to a state law provision that implicates both these right-to-petition and electoral-speech concerns. The "related campaign expenditure" rule in the VCFL, 17 V.S.A. § 2809(d), establishes a

"presum[ption]" that an "expenditure," by a political party or a political committee that recruits or endorses candidates, that "primarily benefits" six or fewer Vermont state candidates who are "associated" with that spender, is both intended to promote the election or defeat of one or more of those candidates and is coordinated with them. If this presumption goes unrebutted, then the expenditure is subject to the VCFL's low candidate contribution and unique candidate expenditure limits.

This presumption serves no governmental interest and unduly chills the exercise of First Amendment rights of individuals and groups, and a decision upholding it would mark an unwarranted departure from established First Amendment law concerning burdens of proof in litigation. This provision in the VCFL has garnered much less attention in this litigation than the issues of direct candidate contribution and expenditure limits (which we do not address), and the Court of Appeals below upheld the presumption with but cursory analysis. See *Landell v. Sorrell*, 382 F. 3d 91, 145-46 (2004). But this is an issue of substantial importance in its own right, for its effect is to impose, incompatibly with the First Amendment, a risk on political committees and political parties that their speech undertaken independently of candidates will be subjected to governmental limits applicable only to contributions.

THE "RELATED CAMPAIGN EXPENDITURE" PROVISIONS OF THE VERMONT CAMPAIGN FINANCE LAW

Under the rubric "Accountability for related expenditures," see 17 V.S.A. § 2809, the VCFL defines and regulates a form of electoral spending termed a "related campaign expenditure made on the candidate's behalf." See 17 V.S.A. § 2809(c).[2]

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[2] A "candidate" is an individual who has either accepted "contributions" or made "expenditures" of at least $500.00, filed a nominating

This kind of "expenditure" consists of two elements: first, it is intended either to promote the election of a specific candidate or group of candidates, or to defeat an opposing candidate or group of candidates; and, second, it is "facilitated by, solicited by or approved by the candidate or the candidate's political committee." *Id.*[3] The latter element codifies Vermont's version of "coordination," and regulations issued by the Vermont Secretary of State require the candidate or her committee to act consciously and not accidentally in order that this element be met. *See* Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses" ("Rule 2000-1"), Sec. 2(b)-(d).[4] And, while Rule 2000-1 eschews a requirement of "specific intent" by a candidate or his political committee that a third-party expenditure be "related," it requires that the candidate or his committee have either "some knowledge . . . or willful blindness" of the fact that the expenditure will be made on the candidate's behalf. *Id.*, Sec. 2(a).

The making of a "related campaign expenditure" triggers two significant consequences. First, the "related campaign expenditure . . . shall be considered a contribution to the

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petition, been nominated by a primary or caucus, or announced that he or she seeks elective office. 17 V.S.A. § 2801(1). An "expenditure" includes "a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election or supporting or opposing one or more candidates." 17 V.S.A. § 2801(3).

[3] The only exception to this definition is an expenditure under $100.00 for "refreshments and related supplies" for "a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally." 17 V.S.A. § 2809(d)(1)–(3).

[4] The VCFL explicitly confers authority on the Secretary of State "to adopt rules necessary to administer [§ 2809]," see 17 V.S.A. § 2809(f), so Rule 2000-1 is an authoritative construction of the statute by the authorized official. *See generally Lemieux v. Tri-State Lotto Commission*, 164 Vt. 110, 112-13 (1995).

candidate on whose behalf it was made." 17 V.S.A. § 2809(a). This in turn subjects the expenditure to Vermont's extremely low contribution limits, namely, $400 per two-year election cycle to a statewide candidate; $300 per cycle to a state senate or county candidate; and $200 per cycle to a state representative or local candidate. See 17 V.S.A. § 2805(a). These limits pertain to contributions from a "single source,"[5] "political committee" or "political party." *Id.*

Second, a "related campaign expenditure" that exceeds $50 "shall be considered an expenditure by the candidate on whose behalf it was made." 17 V.S.A. § 2809(b). This in turn subjects the expenditure to Vermont's unique candidate expenditure limits, namely, $300,000 per two-year election cycle by a gubernatorial candidate; $100,000 per cycle by a lieutenant-governor candidate; $45,000 per cycle by any other statewide candidate; $4,000–$6,500 per cycle by a state-senate candidate; $4,000 per cycle by a county candidate; and $2,000–$3,000 by a state-representative candidate. See 17 V.S.A. § 2805a(a).

To this point, and leaving aside the issues as to whether Vermont's candidate contribution and expenditure limits are themselves constitutional, it may be assumed for purposes of this case that the VCFL's treatment of "related campaign expenditures" is constitutional and generally consistent with coordination regulations in other jurisdictions. Vermont, however, uniquely also dictates that a special burden of proof shall apply in disputes over whether coordination has occurred:

> An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are

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[5] A "single source" includes "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." 17 V.S.A. § 2801(6).

> associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates.

17 V.S.A. § 2809(d).[6] An expenditure "primarily benefits" six or fewer candidates if its "principal purpose" is to do so. Rule 2000-1, Sec. 3(a). Notably, a "political committee" subject to this presumption includes not only an entity that performs exclusively electoral functions in Vermont, but also other, principally non-political entities that undertake at least $500 worth of electoral activity in the state. See 17 V.S.A. § 2801(4).[7]

Regarding how the presumption is litigated, Rule 2000-1, Sec. 3(d) provides that when the presumption attaches, it "can

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[6] This provision also states that such a presumption does *not* apply to an expenditure by a political party or a political committee that "substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity . . ." 17 V.S.A. § 2809(d). The statute is silent about whether the presumption applies to other political party and political committee expenditures; although we assume that this silence means that no such presumption attaches to them either, it is unclear why the VCFL specifically denies that the presumption applies to any particular kinds of expenditures.

[7] Thus, the VCFL defines "political committee" to include "any formal or informal committee of two or more individuals, *or a corporation, labor organization, public interest group, or other entity*, not including a political party, which receives contributions *of more than $500.00* or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question in any election or affecting the outcome of an election." 17 V.S.A. § 2801(4). Vermont added the italicized language in 2005; the previous eligibility for "political committee" status of the entities referenced in that language was at least implicit, inasmuch as the VCFL imposes no source prohibitions on contributions. See 17 V.S.A. §§ 2801(6), 2805(a); Office of the Secretary of State, "Guide to Vermont's Campaign Finance Law" iii, 15, 18 (Sept. 2005), http://vermont-elections.org/elections1/2005CFGuide1129rev.pdf.

be overcome by evidence that the elements of the definition in Section 2809(c)"—that is, the spender's election outcome-influencing intent *and* the spender's coordination with one or more candidates—"were not met" or that "the elements in 2809(d)(1-3)"—that is, the exception for under-$100 refreshments at meet-the-candidate events—"apply." And, as described above, if the presumption is not overcome, then the expenditure is treated as a contribution to and an expenditure by the candidates who are "benefited" by it.

Litigation that triggers the presumption may be initiated by either the state or a candidate. A state's attorney or the state attorney general may institute actions for injunctive and other relief to restrain or abate a violation of the VCFL, including a breach of its contribution and expenditure limits that results from the making of a "related campaign expenditure." See 17 V.S.A. § 2806(c). Alternatively, a candidate may initiate accelerated litigation over whether such an expenditure was coordinated with an opposing candidate, who, if it was, must be treated as having received a contribution and made an expenditure: "A candidate may seek a determination that an expenditure is a related expenditure made on behalf of an opposing candidate"—that is, an individual who is "seeking the same office," Rule 2000-1, Sec. 5, meaning either the complaining candidate's primary or general election opponent or a candidate seeking a different party's nomination—"by filing a petition with the superior court of the county where either candidate resides." 17 V.S.A. § 2809(e). Within 24 hours of that filing, the court must schedule a hearing, and the case must both take precedence over all but "cases the court considers of greater importance" and be tried "at the earliest practicable date and expedited in every way." *Id.*

The defendant in any such proceeding may be a political party, a political committee, a candidate, or all of them, for culpability potentially lies for both the making and the receipt of an unlawfully excessive contribution (and, for a candidate,

for making unlawfully excessive expenditures), and the VCFL imposes up to a $10,000 civil penalty against any violator of the statute. See 17 V.S.A. § 2806(b). Moreover, a candidate who violates the VCFL and who opted for public financing of his candidacy, see 17 V.S.A. §§ 2851-56, must refund to the state the unspent balance of the state campaign finance grants he received up to the date of the violation, see 17 V.S.A. § 2806(b)—a potentially campaign-ending penalty.

Finally, in some cases, the presumption may attach at the outset of a lawsuit. The court's "findings and determinations" in a candidate-brought action constitute "prima facie evidence in any proceedings brought for violations of [§ 2809]." 17 V.S.A. § 2809(e). This apparently means, for example, that if the defendant in such a case—say, an opposing candidate to the candidate-plaintiff—loses because she failed to rebut the presumption, then in a subsequent proceeding brought by either the same candidate-plaintiff or by the state against the political committee or political party that made the now-adjudicated "related campaign expenditure," the subsequent-case plaintiff is relieved of his initial burden of production, for a "prima facie case" on the merits is deemed to have been made, placing the presumption on the defendant immediately upon the filing of the new action.

SUMMARY OF ARGUMENT

1. The Vermont Campaign Finance Law imposes a burden of persuasion on a defendant political committee, political party or candidate to demonstrate that an "expenditure" by a committee or party, including speech about candidates or an election, was not a "related campaign expenditure," that is, intended to influence the election or defeat of six or fewer candidates and coordinated with a candidate. This presumption imposes a burden on both speech and association because it applies to *all* such spending, including that which is actually uncoordinated with any

candidate. And, the independent political speech that is the principal target of the presumption is core First Amendment expression that, since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has routinely protected against legislative efforts at prohibition or limitation in various contexts.

That the burden at issue is imposed by a procedural requirement of proof rather than a direct restraint on spending for speech does not relieve the presumption of constitutional significance. If unrebutted, the presumption converts constitutionally unlimitable speech into a contribution that is strictly limited by the VCFL, as well as into a limited expenditure by the candidate, and the VCFL imposes civil monetary penalties and other sanctions for breaches of those limits. But there is a "fundamental constitutional difference" between independent expenditures and contributions. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 614-15 (1996). In *Colorado*, the Court struck down the Federal Election Commission's conclusive presumption that a political party's expenditures were coordinated with its candidates, treating the expenditures at issue as core First Amendment speech and finding no empirical basis for that presumption. The VCFL presumption concerns the same kind of speech and similarly lacks empirical support.

For First Amendment purposes the fact that the VCFL presumption is rebuttable does not distinguish it from the presumption invalidated in *Colorado*. Burdens of proof allocate the risks of prevailing or losing in litigation, and, therefore, must protect First Amendment interests just as must substantive standards of speech and conduct. In cases from *Speiser v. Randall*, 357 U.S. 513 (1958), to *Virginia v. Black*, 538 U.S. 343 (2003), the Court has invalidated procedures in administrative and judicial proceedings that imposed presumptions or other burdens of persuasion on those engaged in speech or association in a manner that chilled their consti-

tutionally protected activities and compelled them to prove that protection was due rather than required the state to prove that it was not. As established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent defamation cases, these same principles apply with equal force in litigation involving only private and not governmental parties.

The VCFL presumption takes the same sort of unconstitutional "shortcut" as those that the Court has repeatedly rejected, for it chills the speech and association of political committees, political parties and candidates lest they be compelled to account for themselves in court and bear the burden of proving that they acted independently from one another. And, that burden is even more severe where a political committee or party bears the burden of disproving a candidate's state of mind.

2. Due to the presumption's deleterious impact on core First Amendment activity, it could be justified only if Vermont can bear its burden to prove that it is narrowly tailored to serve a compelling governmental interest. But the presumption serves no legitimate state interest at all, Vermont did not clearly articulate one in the courts below, and the Court of Appeals identified none. The State's legitimate interest instead lies only in regulating actual coordination as a contribution, and the VCFL separately does that. The presumption does not serve an interest in preventing "circumvention" of the State's contribution limits because that justification applies only to the regulation of actual contributions, coordinated activities and solicitations, not the regulation of independent expenditures themselves. The lack of any empirical support for the presumption further undermines any contention that it is narrowly tailored even if a compelling governmental interest were asserted and discernable.

ARGUMENT

I. THE "RELATED CAMPAIGN EXPENDITURE" PRESUMPTION IMPOSES A BURDEN OF PROOF THAT IS INCONSISTENT WITH THE FIRST AMENDMENT

Although § 2809(d) does not explicitly speak in terms of burdens of proof, it plainly reverses the "ordinary default rule" in litigation that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims" and "the risk of failing to prove their claims." *Schaffer v. Weast*, 126 S. Ct. 528, 74 U.S.L.W. 4009, 4011 (Nov. 14, 2005). For, under § 2809(d), the plaintiff—whether the state or a candidate—bears the initial burden of production to show (a) the making of an "expenditure" by a political party or a political committee (b) that "primarily benefits" (that is, whose "principal purpose . . . is to promote," Rule 2000-1, Sec. 3(a)) "six or fewer candidates who are associated with [the party or committee]." At that point in the proceeding, the ultimate facts at issue—the spender's intent to promote the election or defeat of a candidate[8] and the spender's coordination with

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[8] Definitional § 2809(c) uses the phrase "intended to promote the election . . . or defeat" of a particular candidate or group of candidates as an element of the term "related campaign expenditure," but § 2809(d) uses a different formulation—"primarily benefits six or fewer candidates"—to describe when the presumption attaches, and Rule 2000-1, Sec. 3(a), defines the latter to mean having "the principal purpose . . . to promote six or fewer specific candidates." Thus, in contrast to § 2809(c) "inten[t]," the term "primarily benefits" may reach only a more exacting degree of intent—"principal" rather than any—and a less exacting range of expenditure objectives—promoting a candidate rather than specifically promoting the "election" or "defeat" of a candidate. If so, these differences mean that the plaintiff's burden of production requires showing something other than satisfaction of the intent element of § 2809(c), but meeting that burden nonetheless triggers the presumption that this intent element is satisfied. However, even if "primarily benefits" is precisely congruent with the § 2809(c) intent element, § 2809(d) imposes no burden of production on the plaintiff whatsoever regarding the *coordination* element of § 2809(c).

a candidate—are presumed, and, as Rule 2000-1, Sec. 3(d) explains, the presumption must be "overcome by evidence" to the contrary presented by the defendant in order for the defendant to prevail. *See generally Schaffer*, 74 U.S.L.W. at 4011; *Director, Office of Workers' Compensation Progams v. Greenwich Collieries*, 512 U.S. 267, 272-75 (1994). The Court of Appeals did not address the nature of the burden of proof imposed by the presumption, and its opinion, see *Landell v. Sorrell*, 382 F. 3d at 145-46, can be read to suggest that a defendant need only meet the plaintiff's burden of production with a production of its own, leaving the ultimate burden of persuasion on the plaintiff where the resulting evidence is "closely balanced." See *Schaffer v. Weast*, 74 U.S.L.W. at 4011. But the Court of Appeals ignored the actual operation of the presumption, particularly the state's authoritative construction of it in Rule 2000-1 quoted above.

In this constitutional challenge, this imposition of the burden of proof must be considered in its application to speech that occurs completely independently of a candidate, for the presumption explicitly applies to *all* speech by a political committee or a political party whose principal purpose is to influence the election of six or fewer candidates regardless of whether, in fact, that speech was coordinated with any candidate. Thus, every incident of such speech[9] entails the risk of entanglement in a judicial proceeding in which the speaker,

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Rather, that fact is presumed once the plaintiff meets his burden of production of showing an expenditure that "primarily benefits six or fewer candidates."

[9] Actually, neither the "primarily benefits" nor the "intended to promote" element requires that an "expenditure" refer to a candidate or, indeed, that it comprise a communication at all, and the VCFL definition of "expenditure" does not confine it to communications. See 17 V.S.A. § 2801(3). But at least where an expenditure entails speech or association, the § 2809(d) presumption of coordination implicates core First Amendment interests, as discussed in the text.

the candidate or both must disprove coordination. Section 2809(d) therefore imposes a burden on speech and association. See generally pp. 14-22, below; *see also Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986) (relying on *Speiser v. Randall*, 357 U.S. 513 (1958) (discussed at pp. 18-19, below) in holding that a requirement that an independent non-profit ideological corporation use a highly regulated political committee for its independent expenditures may have the "practical effect . . . to discourage protected speech" and therefore is "an infringement on First Amendment activities").

Much of the speech that § 2809(d) burdens, and that is the presumption's evident principal target, comprises core First Amendment expression. "[D]ebate on the qualification of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minnesota v. White,* 536 U.S. 765, 781 (2002) (interior quotation marks omitted). *See generally McConnell v. Federal Election Commission*, 540 U.S. at 205, 221; *Buckley v. Valeo*, 424 U.S. at 14, 39, 48; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[the] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"). Because independent advocacy regarding candidates is so highly valued, the Court, in a line of cases dating from *Buckley*, has "routinely struck down limitations on independent expenditures by candidates, other individuals and group . . ." *Federal Election Commission v. Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431, 441 (2001). *See Colorado Republican Federal Campaign Committee v. Federal Election Commission ("Colorado I")*, 518 U.S. 604 (1996) (rejecting conclusive presumption that a state political party's independent expenditures were coordinated with its candidate for the United States Senate); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (invalidating application of FECA prohibition of independent ex-

penditures by ideological non-profit corporation); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating Presidential Election Campaign Funding Act limit of $1,000 on spending by federal political committees "to further the election" of publicly financed candidates); *Buckley v. Valeo*, 424 U.S. at 39-51 (invalidating $1,000 limit on independent expenditures by any person).[10]

Section 2809(d) also burdens fundamental associational rights because it compels a candidate, political party or political committee to disclose information about its political activities and contacts with each other in order to "overcome" the presumption that a particular expenditure was coordinated. Yet coordination disputes often concern "the very heart of the organism which the First Amendment was intended to nurture and protect: political expression and association concerning . . . elections and office holding." *AFL-CIO v. Federal Election Commission*, 333 F. 3d 168, 170 (D.C. Cir. 2003) (interior quotation marks omitted). Absent the presumption, in many cases that person could rely upon a state or candidate plaintiff's failure to present evidence concerning that conduct and prevail at that point against the coordination allegation.[11]

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[10] The sole exceptions to this line of authority are the Court's holdings concerning independent expenditures by corporations, *see Austin v. Michigan Chamber of Commerice, Inc.*, 494 U.S. 652 (1990), and election-proximate broadcast references to candidates by corporations and labor organizations. See *McConnell v. Federal Election Commission*, 540 U.S. at 203-11.

[11] In some cases under § 2809(d) the plaintiff can very easily meet its initial burden of production. Where the expenditure at issue includes express advocacy of election or defeat, and perhaps other speech formulations, the plaintiff can meet that burden and rest its affirmative case-in-chief simply by introducing the communication itself, for that would show the requisite "primar[y] benefit" to a candidate that triggers the presumption of coordination. The defendant must then either lose, or put on evidence to

Section 2809(d) further impairs freedom of association by creating an improper incentive for a candidate to file an action against his opponent and his opponent's perceived allies in order to force them to publicly account for their activities and contacts at acute risk to themselves if they fail to do so. *Cf. id.* at 178 (Federal Election Commission ("FEC") procedure of placing closed investigative files on public record implicates First Amendment concerns by creating incentive for persons to file complaints against political adversaries as a means both to chill their expression and to learn their political strategies so it can be exploited to the complainant's advantage). *See also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557-58 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *id.* at 265-66 (Frankfurter, J., concurring); *Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d at 88-92.[12]

That the burden at issue here is imposed by a procedural requirement of proof in litigation rather than by a direct prohibition or amount limitation on spending for speech does not

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rebut the presumption, whereas absent the presumption the defendant could have prevailed at that point in the proceeding without making any further demonstration concerning its political and associational activities.

[12] In *McConnell v. Federal Election Commission*, 540 U.S. at 219-23, the Court rejected a challenge to § 214(c) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, codified at 2 U.S.C. § 441a(a) note, which provided that "agreement or formal collaboration" were not necessary elements of coordination under FECA, reasoning in part that such a requirement in itself would not preclude intrusive coordination investigations. *But cf. Colorado II*, 533 U.S. at 471 n. 3 (Thomas, J., concurring) (enforcement of coordination rules "inevitably . . . involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors]") (interior quotation marks omitted). In contrast, the VCFL presumption inevitably compels a political committee or party to present evidence concerning its political and associational conduct, subjecting itself to cross-examination and other process, lest it be held to have engaged in coordination and endure the resulting attributions that contributions to and expenditures by candidates were made.

relieve it of constitutional significance. For, one effect of the presumption, if unrebutted, is to convert constitutionally *unlimitable* independent speech into a strictly limited *contribution* under the VCFL, despite there being a "fundamental constitutional difference" between independent expenditures and contributions. *See Colorado I*, 518 U.S. at 614-15. *See also McConnell v. Federal Election Commission*, 540 U.S. at 134-35. In *Colorado I*, 518 U.S. at 620, the Court followed this distinction in striking down a FECA provision that imposed amount limits on political party independent expenditures, for "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.* at 616.

In doing so, the Court rejected the FEC's rationale in support of the limit that "*all* party expenditures are 'coordinated'" with the party's candidates, *id.* at 619 (emphasis in original), because, in the FEC's words, "'[political] party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.'" *Id.* at 620. The Court found no evidence to support that proposition, *id.* at 620-21, and pointedly observed that "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it so." *Id.* at 621-22.

VCFL § 2809(d)'s presumption of coordination between state candidates and political parties rests on no firmer empirical basis, and its identical presumption regarding coordination between candidates and non-party, non-candidate political committees strays even farther afield from the realms of fact and plausibility.[13] We are aware of no record evi-

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[13] Section 2809(d) does refer to candidates as being "associated with the political party or political committee making the expenditure," but the term "associated" is undefined, and in *Colorado I* association in the sense

dence, and no judicial authority, supporting the notion that a speaker who advocates the election or defeat of six or fewer (or any other number of) candidates is any more likely to have coordinated with them than a speaker who explicitly advocates the election of more candidates or, indeed, of a party's entire ticket. *Cf. Tot v. United States*, 319 U.S. 463, 467-68 (1943) (statutory presumption of proof of fact cannot be sustained under Due Process Clause where inference is so strained as not to bear a reasonable relation to the circumstances of life as we know them).

And, for purposes of First Amendment application, the rebuttability of the VCFL presumption provides no pertinent analytical distinction from the conclusive presumption at issue in *Colorado I*, both because the Court's evidentiary analysis there did not turn on that conclusiveness and because, as the Court has frequently recognized, the First Amendment may be infringed as much by arbitrary burdens of proof as by direct prohibition or limitation.

"[I]t is important to ensure not only that . . . substantive First Amendment standards are sound, but that they are applied through reliable procedures. This is why . . . some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—[are] constitutionally required in proceedings that may penalize protected speech." *Waters v. Churchill*, 511 U.S. 661, 669 (1994). "The procedures by which the facts of [a] case are determined assume an impor-

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of a state party's nomination of candidates and overt coordination with its candidates of some activities did not warrant a presumption that *all* of the party's activities were coordinated with those candidates. Accordingly, no coordination of any specific expenditure can be assumed as to candidates and the non-party political committees with which they "associate." In any event, the First Amendment cannot abide the conversion of core independent speech into "contributions" simply because there is other "associat[ion]" between the spender and the candidate.

tance fully as great as the validity of the substantive rule applied," and "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. at 520-21. And, in all litigation, "[t]he more stringent the burden of proof a party must bear, the more the party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 283 (1990).

In *Speiser v. Randall*, the Court held unconstitutional a state's imposition on a taxpayer of the burden of persuasion, both administratively and in court, as to his eligibility for a tax exemption because he refused to sign an oath disclaiming advocacy of the unlawful overthrow of the government, where taxpayers who signed the oath were deemed to be eligible. The Court reasoned that because "[t]here is always in litigation a margin of error, representing error in factfinding, . . . [w]here the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion. . . ." *Id.* at 525-26. For, placing the burden instead on the taxpayer "will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens," a problem that is exacerbated where "the complexity of the proofs and the generality of the standards applied" require the speaker to "prov[e] the negative of . . . complex factual elements." *Id.*

> In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means

> of escape from constitutional restrictions." *Bailey v. State of Alabama*, 219 U.S. 219, 239 [1911]. . . . [W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.

Id. at 526, 529-30.

The Court employed similar reasoning and language when it invalidated, under the First and Fourteenth Amendments, a felony trial jury instruction that a defendant's public burning of a cross (the first element of the offense at issue) was "prima facie evidence of [the defendant's] intent to intimidate a person or group" (the second element). See *Virginia v. Black*, 538 U.S. at 348. The Court reasoned that this evidentiary rule "makes no effort to distinguish among . . . different types of cross burnings," including those that reflect "core political speech," and because it "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate, it permits the jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense"; the prospect of such a prosecution "chills constitutionally protected speech," and "[t]he First Amendment does not permit such a shortcut." *Id.* at 365-67. *See also Dombrowski v. Pfister*, 380 U.S. 479, 494-96 (1965) (state law requiring members of "communist-front organizations" to register as such rests on unconstitutional rebuttable presumption that groups that are so designated by various federal authorities are such organizations); *Freedman v. Maryland*, 380 U.S. 51 (1965) (state law violated First Amendment by imposing burden on film exhibitors to initiate judicial proceedings and bear burden of persuasion in court on claim that film was improperly disapproved by state censorship board).

The § 2809(d) presumption takes a comparably unconstitutional "shortcut" in placing a political committee or party to the chilling choice of engaging in speech at the risk of having to prove that it did so without coordination. And, the burden here is even more onerous than that which confronted the taxpayer in *Speiser*. There, at least, the taxpayer had "only" to present evidence about his own conduct. But under § 2809(d), a political committee or party may have to disprove a *candidate's* lack of any knowledge or "willful blindness" as to what the committee or party did, because § 2809(d) "presume[s]" one or the other, see Rule 2001, Sec. 2(a)—a daunting task at the very least.[14]

The Court rejected a presumption of disfavored association less exacting than § 2809(d) in *Healy v. James*, 408 U.S. 169 (1972). There, a state-supported college disapproved an application of the campus chapter of Students for a Democratic Society ("SDS") for official recognition, which entailed privileges to hold meetings and carry out other activities on the campus, in part because the group did not demonstrate that it was unaffiliated with the national SDS. *Id.* at 172-77. The Court held that in doing so the college had "misplac[ed] the burden of proof," *id.* at 185, because, in light of the First Amendment associational rights that hinged on approval, once the group completed the application the college more appropriately bore the burden to demonstrate both that the group was affiliated with national SDS and that such affiliation warranted rejection. *Id.* at 183-84. Similarly, in light of

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[14] Moreover, insofar as § 2809(e) eliminates even a plaintiff's burden of production in a subsequent proceeding concerning the same "related campaign expenditure," see p. 8 above, "[d]ecisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding —as [respondents] urge [the Court] to do here—are extremely rare." *Schaffer v. Weast*, 74 U.S.L.W. at 4011 (emphasis in original). For the reasons explained in the text, this aspect of the VCFL scheme does not present one of those "extremely rare" occasions when such placement is justified.

the First Amendment interests at stake here, forcing a political committee, political party or candidate to prove its non-coordination with others unconstitutionally places the burden of persuasion on the wrong party.

The fact that some litigation entailing the § 2809(d) presumption may be waged only by private parties does not alter the First Amendment analysis; rather, the same principles apply equally to burdens of proof in private litigation. Thus, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court rejected, under the First and Fourteenth Amendments, a state law that created presumptions that a plaintiff public official's personal reputation was injured and that he sustained damages simply by the official's showing that the defendant made certain statements about the agency of which the official was in charge; the defendant could rebut these presumptions only by carrying the burden of persuasion as to the truth of his statements. *Id.* at 267. The Court equated the "inhibiting" fear of a civil damages award with fear of criminal prosecution, *id.* at 277, and concluded that the state's presumptions, despite the defendant's opportunity to rebut them, impermissibly would cause "self-censorship":

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall,* [357 U.S. at 526]. The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279. Similarly, in a subsequent series of First Amendment decisions in the defamation field, the Court has determined the nature and allocation of burdens of proof in order to "tip the scales" "in favor of protecting true speech." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771-77 (1986). "[T]he need to encourage debate on public issues

that concerned the Court in the governmental-restriction cases is of concern in a similar manner in [a] case involving a private suit for damages"; placing the burden on the speaker to prove "truth" exerts a "chilling effect [that is] antithetical to the First Amendment's protection of true speech on matters of public concern." *Id.* at 777.

By the same token, then, § 2809(d)'s imposition on a defendant of the burden of persuasion as to coordination with a candidate, on pain of civil penalties and candidate forfeiture of public funding, exerts an unacceptable chilling effect on independent political speech and association. Placing that burden instead on the plaintiff is necessary to protect core First Amendment expression that § 2809(d) improperly presumes lacks independence and subjects to those potentially onerous sanctions.

II. THE PRESUMPTION IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST

Because of its deleterious impact on political expression, the VCFL presumption could be upheld only if the State can meet its "burden to prove that [it] is (1) narrowly tailored to serve (2) a compelling state interest." *See Republican Party of Minnesota v. White*, 536 U.S. at 774-75. *See also McConnell v. Federal Election Commission*, 540 U.S. at 204-05; *Austin v. Michigan Chamber of Commerce, Inc.*, 494 U.S. at 659-60. But the presumption serves no legitimate governmental interest at all, the State did not clearly articulate one in the courts below, and the Court of Appeals did not advert to one. See *Landell v. Sorrell*, 382 F. 3d at 145-46. Rather, the State's sole relevant legitimate interest lies in regulating *actual* coordinated in-kind contributions, and § 2809(a)'s inclusion of "related campaign expenditures" within the scope of the term "contribution" under the VCFL precisely serves that interest.

To be sure, the Court has recognized that some measures to prevent "circumvention" of a contribution limit serve the compelling governmental interest in dealing with corruption, but the Court has so approved only restraints on actual contributions, coordinated activities and solicitations. *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. at 145, 163, 165, 174-175; *Colorado II*, 533 U.S. at 441-42. In *Buckley v. Valeo*, 424 U.S. at 47, the Court rejected "preventing circumvention" as a justification for FECA's then-$1,000 limit on independent expenditures themselves because, "[r]ather than preventing circumvention of the contribution limitations, [the independent expenditure limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *See also Colorado I*, 518 U.S. at 613-18. Likewise, the VCFL's placement of a thumb on the litigation scale in order to relieve the state and private litigants of the burden to persuade a court that a coordinated in-kind contribution occurred does not "prevent circumvention," but instead indiscriminately adversely affects all those whose speech is truly independent, not just those who, in fact, coordinated.

It follows that even if a compelling governmental interest in the presumption were asserted and discernable, the presumption is irrationally designed and not tailored to serve any. As already discussed, there is no empirical evidence to support it, and its application at the threshold of "six or fewer" candidates is both arbitrary and unrelated to any plausible feature of an expenditure that would objectively render it more likely to be coordinated than if it promoted a greater number of candidates. *Cf. Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963, 968 (8th Cir. 1999) (rejecting as not narrowly tailored to serve asserted anti-corruption and other interests a similar state law requiring candidates either to disavow and "correct[]" a group's independent expenditures, or to refrain from doing so, be presumed to have approved the expenditures, and have the expenditures attrib-

uted as the candidate's own). Absent narrow tailoring in service of a compelling governmental interest, the "[a]ccountability" for coordination imposed by § 2809(d) on political committees, political parties and candidates cannot be sustained under the First and Fourteenth Amendments.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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NEIL RANDALL, *ET AL.*, PETITIONERS,

V.

WILLIAM H. SORRELL, *ET AL.*, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR HEIDI BEHRENS-BENEDICT, JANICE BOWLING, AND DON HOOPER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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In the Supreme Court of the United States

No. 04-1528
NEIL RANDALL, *ET AL.*, PETITIONERS
V.
WILLIAM H. SORRELL, *ET AL.*, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR HEIDI BEHRENS-BENEDICT, JANICE BOWLING AND DON HOOPER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS[1]

INTEREST OF THE AMICI CURIAE

With the attached or previously filed written consent of all parties, Heidi Behrens-Benedict, Janice Bowling, and Don Hooper (collectively, the "Amici Candidates") submit this brief in support of the 1997 Vermont Campaign Finance Reform Act ("Act 64"), which expressly limits expenditures in campaigns for public office. Each Amici Candidate campaigned for the United States House of Representatives in 2004, and two of the Amici Candidates campaigned for the same office in prior elections. In particular:

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[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity other than counsel for the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

- *Amicus* Heidi Behrens-Benedict, a Democrat from the 8th District of Washington, ran unsuccessfully for the U.S. House of Representatives in 1998, 2000, 2002, and 2004. In 1998, 2000, and 2002, Ms. Behrens-Benedict challenged a Republican incumbent. In 2004, Ms. Behrens-Benedict ran for an open seat but was defeated in the Democratic primary.

- *Amicus* Janice Bowling, a Republican from the 4th District of Tennessee, ran unsuccessfully for the U.S. House of Representatives in 2002 and 2004. Ms. Bowling ran for an open seat in 2002 and ran against a Democratic incumbent in 2004.

- *Amicus* Don Hooper, a Republican from the 1st District of Michigan, ran for the U.S. House of Representatives in 2002 and 2004. Mr. Hooper challenged unsuccessfully the Democratic incumbent in the general election.

Each Amici Candidate experienced firsthand the effects of unfettered campaign expenditures on their campaigns and the electoral process. Through extensive engagement with voters, the Amici Candidates also observed the impact of unlimited campaign spending on the public's faith in representative democracy. The Amici Candidates thus provide valuable perspective on the impact of our current system of unbridled expenditures on the ability and willingness of ordinary individuals to run for public office, the protection of incumbency, and the public's perception of the electoral process. The Amici Candidates respectfully submit that the competitiveness of, and public trust in, representative democracy are compelling governmental interests, and that campaign spending limits would be an effective and targeted means to achieve these critical ends.

SUMMARY OF ARGUMENT

The current system of unlimited campaign spending has produced skyrocketing campaign costs and vast spending disparities between winners and losers, and incumbents and challengers, in electoral races. This state of affairs has eroded electoral competition by rendering campaigns by ordinary citizens prohibitively expensive, if not competitively impossible. Unlimited spending has served as an incredibly effective incumbency-protection system. Incumbents – with the help of political action committees ("PACs") – consistently and thoroughly out-raise and outspend challengers, especially in the House of Representatives, leading to victories more than 95 percent of the time in the last decade. *See* Center for Responsive Politics, *Reelection Rates Over the Years*, http://www.opensecrets.org/bigpicture/reelect.asp?cycle=2002 (last visited Feb. 6, 2006). Further, large incumbent war chests discourage challengers in the first place.

The correlations between money, electoral success, special interests and incumbency are not lost on average citizens. In strategy meetings, at debates and fundraising events, and in one-on-one conversations with voters, the Amici Candidates witnessed how the current system has cultivated a culture of cynicism, not only about the ordinary person's ability to participate in government through election to public office, but also about our government's ability fairly and effectively to vindicate the interests of ordinary people.

The Amici Candidates can think of few governmental interests more compelling than vigorous participation and public faith in representative democracy. The Amici

Candidates also submit that campaign-spending limits would directly target the threats currently posed to these interests. Therefore, they urge this Court to affirm the Second Circuit's ruling that campaign-spending limits like those in Act 64 can be narrowly tailored to serve compelling governmental interests.

ARGUMENT

I. Unlimited Campaign Spending Discourages Ordinary Citizens from Running for Elected Office, Particularly Against Incumbents.

The Amici Candidates submit that the current system of unlimited campaign expenditures has created an environment in which the single best predictor of electoral success is a candidate's ability to raise and spend money. This state of affairs discourages qualified but ordinary non-wealthy citizens from challenging opponents with superior access to campaign funds – particularly incumbents, who benefit from inherent fundraising advantages. In the process, electoral competition is diminished and incumbency is promoted. These propositions find ample support in both the available empirical data and the Amici Candidates' own experiences.

A. The Empirical Data.

The relationship between money, victory and incumbency is well illustrated by the available data on the ever-rising costs of campaigning for federal office, the massive spending disparities between winning and losing candidates, and the demonstrated ability of incumbents as a class to out-fundraise challengers.

The Upward Spiral. The overall cost of campaigns has skyrocketed in the last decade. According to the Federal

Election Commission ("FEC"), Congressional candidates spent $1.16 billion on campaigns during the 2003-2004 election cycle, up from approximately $440 million in the 1989-1990 cycle. *See* News Release, Federal Election Commission, Congressional Candidates Spend $1.16 Billion During 2003-2004 (June 9, 2005), *available at* http://www.fec.gov/press/press2005/20050609candidate/20050609candidate.html. Winning House candidates spent a total of $494 million in the 2004 elections, compared with $297 million in 1996. *See id.* This trend shows no sign of slowing; as of the end of the third quarter of 2004, House candidates reported raising $202.4 million, 23 percent more than candidates had raised through the same period in 2003. *See* News Release, Federal Election Commission, House Candidate Fundraising Increases (Oct. 19, 2005), *available at* http://www.fec.gov/press/press2005/20051019candidate/20051019house.html.

The Price of Victory. As overall fundraising and campaign spending have increased, so has the spending gap between winners and losers. According to an analysis of campaign finance data conducted by the U.S. Public Interest Research Group ("U.S. PIRG"), candidates for the House of Representatives and the Senate who outspent their opponents won over 93 percent of general election races in the 2002 election cycle. *See* U.S. PIRG Education Fund, *Look Who's Not Coming to Washington,* at 4 (2003), *available at* http://www.uspirg.org/reports/lookwhosnot1_03.pdf. According to the Center for Responsive Politics, in more than two-thirds of Congressional districts, the winner outspent the second-highest vote-getter by a factor of at least ten to one; in more than 91 percent of districts, the winner spent at least double the amount spent by the runner-up. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2002 Cycle,* http://www.opensecrets.org/

bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 6, 2006). The average winning candidate raised $1,308,270, while the average losing candidate raised only $330,852 – a disparity of 4-to-1. *See* U.S. PIRG Education Fund, *The Role of Money in the 2002 Congressional Elections*, at 14 (2003), *available at* http://www.uspirg.org/reports/roleofmoney2003.pdf.

The Incumbency Advantage. Available data illustrates a similarly pronounced fundraising disparity between incumbents and challengers. In the 2002 election cycle for the House of Representatives, the average incumbent raised $898,382, compared with $197,608 for the average challenger, a margin of 4.5-to-1. All but two percent of House incumbents were reelected. *See* Center for Responsive Politics, *The Big Picture: Incumbent Advantage*, http://www.opensecrets.org/bigpicture/incumbs.asp?cycle=2002 (last visited Feb. 6, 2006).

The trend was similar in the 2004 congressional elections. House incumbents spent an average of $1 million, compared with average expenditures of $269,000 by challengers, a margin of 3.7-to-1. *See* Joseph E. Cantor, *Campaign Finance*, Congressional Research Service, at 4 (Nov. 3, 2005), *available at* http://wwwc.house.gov/case/crs_reports/campaign.finance.pdf. Again, all but two percent of House incumbents were reelected. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform*, at 4 (2006), *available at* http://www.pirg.org/democracy/reports/raisingthelimits.pdf.

If anything, the fundraising advantages of incumbency should be expected to increase. As candidates confront the prospect of financing ever-more-expensive campaigns despite dollar limits on individual contributions, PACs and "bundlers" of large individual contributions play an

increasingly central role in the money chase. Spending by PACs increased by more than 28 percent between the 2001-2002 election cycle and the 2003-2004 election cycle. *See* News Release, Federal Election Commission, PAC Activity Increases for 2004 Elections (Apr. 13, 2005), *available at* http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html. Incumbents are the chief beneficiaries of PAC largess. In 2004, incumbents received 79 percent of the PAC contributions; challengers received only 7 percent. *See id.* Among business-industry PACs, 83 percent of spending went to incumbents, while only 4 percent went to challengers. *See* Center for Responsive Politics, *The Big Picture: PAC Dollars to Incumbent, Challenger, and Open Seat Candidates,* http://www.opensecrets.org/bigpicture/pac2cands.asp?cycle=2002 (last visited Feb. 6, 2006).

The recent doubling of federal hard money contribution limits also seems likely to cement incumbency advantages. Incumbents continue to raise both a greater percentage of their individual funds in contributions of at least $1,000 and much more money in these large gifts overall. In 2004, for example, incumbents out-raised challengers by $178 million in individual contributions of at least $1,000, and the reelection rates in both Houses increased. These increased limits, therefore, seem to have augmented, rather than alleviated, the fundraising gap between incumbents and challengers. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform,* at 8-9 (2006), *available at* http://pirg.org/democracy/reports/raisingthelimits.pdf. The incumbency advantage stands to reason. Moneyed interests view incumbents, who hold established positions in the party and committee hierarchies and benefit from significant barriers to challenger entry, as "sound investment[s]." Center for Responsive Politics, *The Big Picture: PAC Dollars to Incumbent, Challenger, and*

Open Seat Candidates, http://www.opensecrets.org/bigpicture/pac2cands.asp?cycle=2002 (last visited Feb. 6, 2006).

B. The Amici Candidates' Experiences.

The experiences of the Amici Candidates are consistent with the above data. They also illustrate the barriers that the current system has placed in the way of ordinary citizens of modest means who are interested in challenging incumbents for public office.

Amicus Behrens-Benedict. Amicus Behrens-Benedict ran for the House of Representatives four times from 1998 through 2004. Absent her participation in the first three of these races, the incumbent would have run unopposed with an average war chest of over one-and-a-half million dollars. In 1998, faced with this massive disparity in funds, the national party tried to dissuade Amicus Behrens-Benedict from running and did not provide her with any support. Because Amicus Behrens-Benedict was not wealthy, her national party suggested she mortgage her home to help finance campaign costs – a suggestion she did not take.

In the 2000 election, Amicus Behrens-Benedict raised $371,381, while her incumbent opponent and the ultimate winner, Jennifer Dunn, raised more than $1.7 million. Dunn received 14 times more money from PACs than did Amicus Behrens-Benedict. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2000&id=WA08 (last visited Feb. 6, 2006). In 2002, the disparity was even more dramatic: Dunn, who again won the election, raised $1.8 million compared with $133,307 raised by Amicus Behrens-Benedict. Dunn received 71 times more money from PACs. *See* Center for Responsive Politics,

Congressional Races: Total Raised and Spent, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=WA08 (last visited Feb. 6, 2006). Amicus Behrens-Benedict also observed that even PACs with which her stance on issues was aligned were hesitant to provide her with donations because her race was viewed as futile.

Amicus Bowling. Amicus Bowling, a former district director for a Congressman and mother of three, is not independently wealthy. When Amicus Bowling first ran for an open House seat in 2002, her party encouraged her to take out a personal loan to finance her campaign. Instead, she managed to raise $572,625, and two-thirds of that was from individual donors making relatively small contributions. Her opponent, Lincoln Davis outspent her by a factor of 2.3 to 1, contributing $226,500 of his own funds and raising nearly 3 times more from PACs than Amicus Bowling. Davis won by a margin of 52 to 47. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=TN04 (last visited Feb. 6, 2006).

In 2004, Amicus Bowling again challenged Lincoln Davis, who was then an incumbent. Again she was asked to take out a personal loan, but she did not. In this campaign, Representative Davis outspent Amicus Bowling by a factor of 3. Davis, the incumbent, did not need to contribute any of his personal funds, while Amicus Bowing's overall fundraising was cut in half compared to 2002. Most significantly, she received only $9,500 from PACs, a mere 5 percent of the PAC support she received in her race for the open seat in 2002. Davis, on the other hand, received $680,362 from PACs – nearly 60 percent of his total campaign funds. As a challenger without access to PACs or major out-of-state donors, Amicus Bowling relied on

individual contributions from voters in her district for 92 percent of her funds. *See* Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2004&id=TN04 (last visited Feb. 6, 2006). Like Amicus Behrens-Benedict, Amicus Bowling did not receive financial support from certain PACs even though she stood strongly for their issues because, as a challenger, she was not viewed as a worthwhile "investment."

Davis' campaign was conducted primarily through television advertising in all the media markets in the district, while Amicus Bowling was not able to compete with his extensive outlays of funds for television airtime. In fact, she was forced to forgo television advertising in two major media markets in the district. Amicus Bowling also was unable to send as much direct mail as Davis, or counter Davis' use of telemarketing firms to conduct "push poll" campaigns. In 2004, Davis won by a margin of 55 to 44 percent. *See id.*

Amicus Hooper. Amicus Hooper, a retired businessman, mortgaged his home and incurred nearly $20,000 of debt in his campaigns for Congress in 2002 and 2004. Because he could not afford to saturate the media market in his large district with advertising, Amicus Hooper conducted his campaign by traveling around his district to meet with voters, sleeping in his personal camper and using his limited funds to pay for gas. In 2002, the incumbent candidate and ultimate winner, Bart Stupak, outspent Amicus Hooper by a factor of 55 to one; in 2004, the ratio increased to 77 to one. While Amicus Hooper received no PAC money in either election, Stupak received 71 percent of his funding from PACs in 2002, and more than half from PACs in 2004. *See* Center for Responsive Politics, *Congressional*

Races: Total Raised and Spent, http://www.opensecrets.org/races/summary.asp?cycle=2002&id=MI01 (last visited Feb. 6, 2006); Center for Responsive Politics, *Congressional Races: Total Raised and Spent*, http://www.opensecrets.org/races/summary.asp?cycle=2004&id=MI01 (last visited Feb. 6, 2006).

These experiences have left the Amici Candidates convinced that it is virtually impossible for an average citizen without personal wealth or access to PACs or networks of wealthy donors to raise the funds necessary to mount a successful Congressional campaign against a well-funded opponent. The financial advantages of incumbency make the prospects for successfully challenging a sitting Congressperson even grimmer.

II. Unlimited Campaign Spending Engenders Public Perception that Access to Elected Officials Is for Sale.

Collectively, the Amici Candidates have spent several months traveling around their districts and interacting with voters in multiple election cycles. Their anecdotal experiences confirm that most Americans believe corruption is endemic to a political system that, at its core, is driven by an insatiable desire for ever-larger campaign war chests. According to recent polls, public confidence in Congress is at its lowest rate in eight years, and corruption in government shares the top spot with terrorism for public concern. *See* U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform*, at 6 (2006), *available at* http://pirg.org/democracy/reports/raisingthelimits.pdf. The vast sums of money contributed to and expended in political campaigns leave an indelible impression that elected offices can be "bought and sold." *See* Joseph E. Cantor, *Campaign*

Finance, Congressional Research Service, Summary (Nov. 3, 2005), *available at* http://wwwc.house.gov/case/crs_reports/campaign.finance.pdf.

Moreover, the ability of special interests and large corporations to deliver the funds necessary to conduct an effective campaign creates the perception that elected officials elevate these interests' concerns over those of ordinary voters. *See id.* Because money helps win elections, candidates for office understandably focus their campaign efforts on the largest potential donors. In effect, special interests make an investment in, not a contribution to, a candidate's campaign. The public understandably perceives an insidious *quid pro quo* relationship between elected officials and the moneyed interests who made their election possible.

In the course of conducting their campaigns, the Amici Candidates encountered a pervasive perception among voters that the current system of unlimited campaign expenditures has corrupted the fair and effective functioning of government. Many voters believe that it is futile to raise concerns with elected officials because large donors have effectively monopolized political access. The Amici Candidates observed a widespread view that elected officials and candidates are beholden to large donors at the expense of ordinary citizens.

III. Campaign-Spending Limits Would Directly Address The Threats to Electoral Competition and Public Trust.

Based on their experiences, the Amici Candidates believe that campaign-spending limits, such as those embodied in Act 64, would be a focused and effective method of

promoting and enhancing the competitiveness of the electoral process. Under the current system, average citizens effectively are excluded from elected office because they simply cannot raise the money needed to compete in an election, particularly against an incumbent. Leveling the financial playing field would increase electoral competition from challengers, who currently face fundamental and systemic barriers to entry and fair competition.

Further, based on their interactions with voters, the Amici Candidates submit that ending the campaign-finance wars would go a long way toward restoring public confidence in the fairness of government and the responsiveness of elected officials. In fact, the Amici Candidates believe that the majority of voters they interacted with would support campaign-spending limits. This belief is consistent with a recent poll finding that 87 percent of voters think such limits would improve the fairness, honesty and integrity of the electoral process. *See* Press Release, Demos, National Survey Shows That Americans Want Campaign Finance Reform (Jan. 5, 2006), *available at* http://www.demos-usa.org/page423.cfm.

Finally, the Amici Candidates submit that campaign-spending limits would promote these interests without further entrenching incumbents. Other amici in this case have argued that limiting spending would systematically advantage incumbents by preventing challengers from raising enough money to effectively combat incumbents' existing advantages. *See, e.g.*, Brief of Senator Mitch McConnell as Amicus Curiae, at 18-22; Brief of the Republican National Committee as Amicus Curiae, at 22-23. The Amici Candidates believe that this argument is flawed in three critical ways. First, the argument assumes that challengers will regularly be able to out-raise incumbents

when in reality this situation is extremely rare. It also fails to address the massive disparities in PAC funding for incumbents, as Amici Bowling's different experiences in 2002 and 2004 vividly illustrate. Second, the argument ignores the effect of large incumbent war chests on discouraging qualified challengers from entering races in the first place, a hurdle illustrated by Amicus Behrens-Benedict's and Amici Hooper's experiences. Finally, the argument contradicts the experiences of successful challengers. Each of the four challenger candidates that defeated House incumbents in 2002 closed the gap in spending, suggesting that a level playing field, rather than complete outspending, can give a challenger a fair chance. *See* Center for Responsive Politics, *The Big Picture: Winning vs. Spending, 2002 Cycle*, http://www.opensecrets.org/bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 6, 2006) (races for the following districts: 8th District of Maryland, 2nd of Minnesota, 1st of New York, and 5th of Florida).

Fundamentally, the argument that campaign spending limits will further the entrenchment of incumbents ignores that incumbents currently enjoy *all* advantages of incumbency. Eliminating the significant fundraising advantage would at least eliminate one advantage of incumbency. It would not create any incumbency benefits that do not already exist. The Amici Candidates strongly believe that campaign spending limits will help our democracy revive by facilitating representation based on the consent of the governed, not the consequences of the dollar.

CONCLUSION

For the foregoing reasons, the Amici Candidates urge the Court to affirm the Second Circuit's ruling that campaign-spending laws, such as those in Act 64, can be narrowly tailored to serve compelling governmental interests.

Respectfully submitted,

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February 8, 2006

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Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CATO INSTITUTE, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE REASON FOUNDATION IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional pro-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

tections for political speech and association relating to elections, which lies at the very heart of the First Amendment.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies. Central to the mission of the Goldwater Institute's Center for Constitutional Government is studying the constitutional implications of campaign finance reform. The issues presented in this case are of interest to the Goldwater Institute because they involve the fundamental right of all citizens to freely participate and share their point of view in the electoral process. Proponents of increased campaign finance regulations consistently expand the class of justifications supporting limitations on core political speech. Crucial to the preservation of political speech is the renewal of a classical understanding of the robust strength afforded by the First Amendment and its narrow class of exceptions.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

STATEMENT

The Second Circuit in this case has sanctioned an unprecedented and radical restriction on the amounts candidates may *expend* on speech, thus cabining the actual *amounts* of speech they may generate and the *reach* of that speech. It did so on the basis of two supposedly compelling interests that are a far stretch from the interests recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and a considerable stretch even from the somewhat expanded interests applied by this Court in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

The two allegedly compelling interests identified by the Second Circuit are the "interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising[] and (2) the effect that perpetual fundraising has on the time of candidates and elected officials." 382 F.3d 97 (footnote omitted).

The court below also found such interests to be supported by the record before it, a conclusion that mistook the volume of "evidence" for its quality and relevance. The court sub-

stantially deferred to the conclusions of the Vermont legislature, rather than scrutinizing those conclusions to see whether the evidence in fact supported them. *See id.* at 97 n. 1.

While there are many things wrong with the Second Circuit's reasoning and result, this brief will focus primarily on the two interests relied upon by the court to uphold the candidate expenditure limits.

SUMMARY OF ARGUMENT

1. Under strict scrutiny, not every legitimate interest rises to the level of a "compelling" interest. Rather, compelling interests must be different in kind and magnitude from otherwise ordinary, or even important, desires to fix perceived flaws in the political system. Compelling interests likewise must be reasonably definite and have some manageable stopping point, otherwise the limits imposed by strict scrutiny will be diluted to the point of being meaningless. Strict scrutiny likewise requires an independent and meaningful review of the facts alleged to support any claimed compelling interest. Even in the less-scrutinized area of commercial speech, this Court analyzes the facts to ensure that the claimed interest is real and not conjectural. It should be even more diligent under strict scrutiny of direct limits on candidate speech.

2. Vermont's alleged interest in combating the supposed influence and access derived from modest and limited contributions does not involve corruption and is neither compelling nor supported by the evidence. Our representative democracy necessarily involves the exchange of political support for official action. Such support comes in many forms, and legitimately includes at least limited campaign contributions that can only be used for speech. While extreme or coercive influence from large contributions may exert "undue" influence over an office holder, the influence that comes from more limited political contributions *per se* is not illegitimate. While equality in voting is protected at the ballot box, perfect equality of influence in the legislature is not the measure of

whether the system is corrupt. The absence of such egalitarianism is not a threat to legislative processes, which are already protected by numerous checks against undue influence, and is not compelling either in kind or in magnitude in this case. Furthermore, Vermont's egalitarian interest is neither supported by the evidence, nor is its solution narrowly tailored.

3. Vermont's alleged interest in "protecting" candidate time so that it may be reallocated to official duties or to speech activities that Vermont prefers over campaign solicitation and spending is neither compelling nor supported by the record. Saving time for official duties as an interest both proves too much and too little. It would justify a host of other restrictions on office holders, yet it offers no justification for restricting challengers whatsoever. Vermont's lack of direct efforts to require office holders to perform their jobs also undermines the genuineness of the interest and Act 64's failure to require that freed time be reallocated to official duties suggests that it will not in fact serve the claimed interest. As for reallocating time between different forms of campaign speech – solicitation and media buys versus personal voter interaction – that interest is simply invalid, as it is up to speakers and listeners to decide how best to speak, not up to the State. And as for the evidence relied upon by Vermont and the Court below, none of it shows that fundraising actually diverts time from the activities Vermont prefers, as opposed to other activities, or that lower spending would reallocate candidate time as Vermont imagines.

ARGUMENT

I. Strict Scrutiny Requires a Narrow View of Compelling Interests and a Critical Review of the Facts Claimed To Support Such Interests.

A. There Are Few Genuinely "Compelling" Interests.

If the current strict scrutiny paradigm has any meaning at all, then presumably the demand that the government establish a "compelling" interest, as opposed to merely "valid" or "important" interests, creates some *meaningful* hurdle that an asserted interest must overcome. That is simply a necessary corollary to the existence of strict scrutiny in the first place. A compelling interest thus should be different in both kind and magnitude from the otherwise broad range of interests that might support government action under lesser scrutiny. Interests that are "too amorphous" or "indefinite[]" or that have "no logical stopping point" are not compelling and would provide far too much leeway for regulation in areas most strongly protected by the Constitution. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality) (lack of compelling interest for racial classifications).

B. The Facts Establishing Any Compelling Interest Must Be Critically and Skeptically Reviewed.

As this Court has held, appellate review of facts in a First Amendment case must be independent and must guard against the manipulation of the facts to circumvent the protections afforded to speech. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Indeed, this Court has consistently turned a skeptical eye to legislative findings in support of speech restrictions, even in the less-scrutinized context of commercial speech. *See, e.g., Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 188, 192 (1999) (government must demonstrate the "'harms it recites are real,'" not "'mere speculation or conjecture'"; failure to take non-speech regulatory action to address alleged inter-

est undermines asserted interest) (citation omitted); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regulatory scheme undermined asserted government interest).

While this Court occasionally has given greater leeway to legislative findings in the context of *contribution* restrictions – seemingly because the speech-value of contributions have been considered slight and the level of scrutiny is accordingly relaxed – there is no justification for importing such leeway into genuine strict scrutiny of candidate expenditure limits, which directly cap the amount and scope of candidate political speech. Instead, this Court should insist, as in the commercial-speech context but with greater vigor, that the harms asserted by the State are "real," not "conjecture," and that they in fact flow from the activity being restricted.

While the court of appeals purported to review the facts independently and meaningfully, it significantly diluted its factual scrutiny in this case and often expressed inappropriate deference. For example, it endorsed the district court's "'considerable deference' to the legislative findings on the need for the law," and cited favorably to Justice Breyer's concurrence in *Shrink*, which suggested deference to the legislature's "'political judgment.'" 382 F.3d at 113 (citations omitted). The court of appeals likewise did "not question the validity of the factual findings developed by the legislature in support of Act 64,[]" and erroneously placed upon the plaintiffs the burden of producing "competing evidence" rather than accepting for itself the duty to skeptically review the legislature's "findings" from the outset. *Id.* at 114 (footnote omitted). But it is the State's burden to establish its interest, and where a critical review of the State's evidence is sufficient to undermine the State's conclusions, a compelling interest has not been established, notwithstanding whether plaintiffs proffered *evidence* rebutting the State's speculative or incomplete findings. *Cf. Celotex Corp.* v. *Catrett*, 477

U.S. 317, 323 (1986) (no need to proffer evidence to overcome a party having, yet failing, the burden of proof).

II. The Claimed Corruption Interest Used To Support Expenditure Restrictions Is Neither Compelling Nor Supported by a Proper Review of the Record.

Corruption, like "torture," is a particularly loaded term that suggests a severe breach of duty incompatible with our political system. For the concept of corruption to carry the moral and legal weight it has acquired and to constitute a "compelling" interest, it cannot possibly encompass practices that are merely unfair or inequitable, but must be limited to a narrow class of extreme deviations from acceptable political practices. To expand the notion "corruption" to include every perceived unfairness is to empty the concept of meaning.

In this case, Vermont's interest amounts to little more than promoting an unreachable egalitarian ideal of *equal* political influence, not combating corruption properly defined. While such a quixotic goal may be permissible, and may even be laudable in a naïve sort of way, it is not compelling.

Disparities in influence are an inherent result of freedom in both politics and the economy and cannot be eliminated without also eliminating the very freedom that makes them possible. Attempting to eliminate all such disparities – rather than simply the most severe and extreme ones – is an endless task at odds with our constitutional system. While eliminating the effects of "large" contributions resulting in grossly "undue" influence may relate to a plausibly limited notion of corruption, eliminating every minor disparity among political actors of different strength, wealth, and motivation is nothing short of a radical repudiation of the very freedoms that allow such disparities to exist. Such a goal is not related to corruption and is not a compelling interest.

A. The Proper Role and Means of "Influence" in Our Constitutional Democracy.

To understand and cabin the notion of corruption, it is essential to reflect on what this Court has already considered corrupt and what sorts of influence are necessarily proper or "due" given the essential predicates of our democracy.

Since *Buckley*, *quid pro quo* arrangements of campaign cash for legislative action have been considered corrupt. The corruption rationale, however, has also been expanded to include the "'undue influence on an officeholder's judgment, and the appearance of such influence'" stemming from large campaign contributions. *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). The rationale has also encompassed the influence exerted by supposedly illegitimate political actors, such as corporations and labor unions, who may parlay government-conferred "special advantages" for acquiring wealth into "an unfair advantage in the political marketplace" and who may act "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Id.* at 155-56 (citations and quotation marks omitted).[2]

But even accepting such a view of corruption as a given in this case, this Court still must find some limit on the more nebulous aspects of corruption if the core of the First Amendment is to retain any significance. In particular, the notion of "undue influence" is a bottomless pit absent some coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See* Jaffe, McConnell *v.* FEC: *Rationing Speech*

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[2] The problems with such an expanded notion of corruption have been catalogued by these *Amici* in prior submissions to this Court. *See* Brief of *Amici Curiae* Center for Competitive Politics, *et al.*, *Wisconsin Right to Life* v. *FEC*, No. 04-1581 (Nov. 14, 2005); Brief of *Amici Curiae* Cato Institute and Institute for Justice, *McConnell* v. *FEC*, Nos. 03-1674 & consolidated cases (July 8, 2003).

to Prevent "Undue" Influence, 2003-2004 CATO SUPREME COURT REVIEW 245, 295-96 (2004).

The first question for this Court, therefore, is what types and degrees of influence are proper or at least acceptable in our constitutional system and what types deviate so far from such a baseline as to be deemed "corrupt."

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. The exchange of *elective office* for desired *official conduct*, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper.

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by periodic voting alone, but also by the political speech of competing interest groups and individuals. What Vermont disparagingly refers to as an "arms race" is in fact a *speech* race, with the goal of persuading voters of competing positions. That such speech is more efficiently and effectively conducted through means that cost candidates money, rather than simply their own or their supporters' time, does not change the fact that the sole use of such money is on speech. Providing financial resources for candidate speech is thus no different, or less valid, than providing personal support for such speech, other than that it is more efficient and effective at helping candidate speech reach the public. Contributions thus are not "arms," they are merely vehicles for speech. And insofar as facilitating such speech, like every other form of political support, may provide some influence to the facilitator, it is simply part of the inherent and proper democratic political exchange.

This Court, however, has deemed the existence of certain types of "undue" influence to be corrupt, which seems to suggest influence out of proportion to the person or group wielding it. The notion of "disproportional" influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary. But the falsely egalitarian notion that the speech of persons and groups *ought* to have influence in strict proportion to the voting strength of the speakers fundamentally misunderstands the principles and predicates of the First Amendment.

In light of such protected means of influence, the disparagement of "special interests" by Vermont and others makes no sense. While such groups may focus their resources on narrow issues, and gain influence from such concentrated attention, such influence is hardly "undue." People routinely focus their energies on what matters most to them, and tend to have influence correlated to the energy invested. That is the nature of *all* interests in a democracy, "special" or otherwise.

Indeed, if anything, a proliferation of relatively narrow and competing interests was a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45

(Rossiter & Kesler eds., 1999). He also recognized that faction was the inevitable result of freedom and could only be eliminated "by destroying the liberty which is essential to its existence," which would be a remedy "worse than the disease." *Id.* at 45-46 Madison's solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Just as the influence exerted by special interests is a natural and acceptable aspect of democracy, campaign contributions are likewise entirely valid means of providing political support, even if such support results in some degree of access or influence. Indeed, this Court has never said that *any* value placed by a candidate on *any* level of contribution is "undue" or "corrupt." Rather, this Court has limited "corruption" to the influence exerted by *large* contributions. *See McConnell*, 540 U.S. at 95 (idea that "large contributions" can corrupt not novel); *Buckley*, 424 U.S. at 26 (danger from "large contributions"). To suggest that all money in politics – even limited contributions used only for speech – is corrupting is to radically depart from the notion of policing "large" contributions, and would eliminate virtually any possibility of "freedom" of speech in a world where "effective political speech" necessarily costs money. *See Buckley*, 424 U.S. at 19.

Finally, to the extent the provision of political support – whether through contributions, direct political speech, or the donation of time to a campaign – is partly a function of wealth, such differential capacity for support does not render any influence deriving therefrom "undue" or illegitimate. Indeed, *Buckley* correctly recognized that government may not "restrict the speech of some elements of our society in order

to enhance the relative voice of others." *Id.* at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

B. Equalizing Personal "Access" to Candidates and Office Holders Is Not a Compelling Interest.

The supposed corruption interest relied upon by the Second Circuit in this case is a far cry from the corruption interest recognized by this Court. There is no *quid pro quo* interest asserted here, and there are no "large" contributions involved given the contribution limits imposed by Vermont. Such limits are precisely the solution to "undue" influence sanctioned by this Court, and appropriately low limits (coupled with means to prevent their circumvention) serve to eliminate – or at least reduce to a non-compelling level – the risk of corruption. And there is no threat from illegitimate political actors in that it is the candidate's expenditures being limited and all contributions are from individuals or PACs.

Instead, Vermont is claiming the novel interest in avoiding reliance on contributions of *any* amount because it deems any marginal influence or access from even modest contributions to be "undue." The problem, supposedly, is that uncapped spending makes contributions desirable to candidates, that candidates thus will "sell" access to contributors, and that those who contribute, or at least contribute at the top of the limits, will receive preferential access relative to those who contribute less or not at all.

Vermont's interest thus boils down to a desire to mitigate relatively minor disparities in access thought to be a result of differential contributions within a system that already limits contributions to modest non-corrupting amounts by Ver-

mont's own reckoning. Such relatively minor disparities in access may be considered unfair, and may be alleged to create some un-measurable degree of distortion in the system, but they hardly constitute "corruption." The desire for more egalitarianism in political *influence*, beyond the existing egalitarianism in actual voting, may be permissible and may or may not be laudable, but it does not entitle Vermont to equate any deviation from some egalitarian ideal with "corruption." Indeed, the problems with such an expansive notion of corruption are myriad.

First, this Court has refused to adopt such a wholesale indictment of contributions *per se*, and has repeatedly recognized that contributions to candidates are valid – and protected – means of expressing political support and engaging in political association. *See Buckley*, 424 U.S. at 23, 24-25. Insofar as such valid support and association translates to some added influence on a candidate, such influence is likewise valid and cannot, *ipse dixit*, be deemed "undue." Any disparities in the ability or willingness of people to give contributions is not at all incompatible with our constitutional system. "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("*MCFL*").[3]

Second, Vermont focuses solely on minor economic aspects of disparate influence, as reflected in differential contributions, while ignoring the far more substantial disparities in political influence generated by wealth, celebrity, occupation, ability and willingness to donate time, and a host of other fac-

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[3] That this Court does not view mere disparities in influence based on financial means to be corrupt can be seen in its refusal to consider the poor a "suspect" class. If the corruption of the legislative process were as bad as Vermont says, one would think the products of that corrupt process would receive heightened scrutiny. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). That they do not suggests the absence of meaningful "corruption" and the lack of a compelling interest.

tors unrelated to the voting strength of individuals. But such disparities in wealth and other resources that can enhance political influence are the inevitable consequence of a free society and a relatively free economy, and there are good practical and policy reasons for accepting such disparities. To the extent such other more significant causes of disparities in access and influence remain, one must question the genuineness of Vermont's interest and ask why contributions are a uniquely illegitimate means of competing for such influence.

Is it more equal to give access to a celebrity or an interest group whose members devote their time, rather than money, to a candidate's campaign? Insofar as the ability to make a contribution gains access for persons lacking in time or ability to engage in such other means of political support, money becomes an equalizer, not a source of undue preference.[4]

Third, to the extent that Vermont is arguing that contributors gain access over non-contributors, the question is why it matters from a systemic perspective. It would seem to matter only if the opinions of non-contributors are not heard. Given that legislators will never have the ability to hear from *every* constituent on *every* issue, they necessarily depend on proxies who collectively can express the views of larger groups of constituents. Vermont's alleged interest seems to suggest that those who cannot give lack proxies and will not have their views expressed by those who can and do give. That assumes

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[4] There is no meaningful difference between a supporter contributing $400 which is then used to hire a canvasser and that same supporter volunteering as a canvasser himself. While a cash contribution may be a more *efficient* means of adding value for a supporter with little spare time but highly marketable skills, the value to the candidate is the same. To indict the use of cash but not time as a means of supporting a candidate is to indict the free-market notions of specialization and efficiency without explaining why influence derived from *either* form of support is "due" or "undue." Any inevitable differences between the degrees of support different persons are willing or able to give – either in cash or in kind – are at least severely limited in the context of cash contributions.

that contributors, as a group, hold different views than non-contributors. While that assumption is questionable, the fact that it underlies, in part, Vermont's interest demonstrates such interest is based on content and viewpoint, and that Vermont seeks to limit the influence of disfavored viewpoints.

Finally, the means by which Vermont has chosen to address the supposed problem cast serious doubt on its existence. While the alleged problem turns on the influence gained through contributions, Vermont has not chosen to ban such contributions, or further lower them to the point where they are not a threat at all, but rather has chosen to limit the *expenditures* – and hence the amount and scope of speech – of candidates as a means of supposedly reducing the *value* of contributions. But any such reduction in contribution value is at the margins at best, and so long as money is required for speech, contributions will be valued by candidates. That Vermont is thus willing to tolerate the continued supposed inequities among contributors and non-contributors, at largely the same levels as existed prior to Act 64, suggests that the interest it alleges is not particularly strong or pressing.

C. The Record Does Not Support a Significant Danger of Undue Access.

Notwithstanding whether Vermont's interest involves "corruption" or is theoretically compelling, the evidence relied upon by the Second Circuit simply does not support the notion that uncapped candidate *expenditures* in the context of already limited *contributions* even implicates that interest. Whatever interest exists in limiting improper preferential access is largely cured by contribution limits and whatever risk remains, if any, is so attenuated and minor as to constitute no genuine danger whatsoever.

The evidence recited by the court of appeals overwhelmingly relates to the dangers posed by *large* contributions, not by expenditures of the candidates themselves. For example, the court of appeals endorsed the district court's finding "'that

large contributors often have an undue influence over the legislative agenda.'" 382 F.3d at 116 (citation omitted) (emphasis added); *see also id.* at 117 (reliance on fewer "larger contributors"); *id.* at 118 n.12 ("large sums"); *id.* at 104 (discussing the supposedly "widely-held public view that donations *in excess* of the Act's limitations were suspicious") (emphasis added). Missing is any evidence of a relationship between uncapped expenditures and any increase in corrupting influence of already limited contributions.

While the court of appeals recognized the obvious disconnect between evidence relating to large contributions and the restrictions imposed on out-of-state contributions, *id.* at 105 (record only supports inference that out-of-state "contributions raise the risk of corruption when they are large – a problem solved by the contribution limits"), it failed to recognize the same disconnect as to candidate expenditures derived solely from limited contributions.

Alleged "Undue" Influence of Special Interests. Generic suggestions that the need to raise money gives influence to interest groups likewise fail to show corruption at all, much less tie it to candidate expenditures above the expenditure ceilings imposed by Vermont. The Second Circuit's reference to "studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates," *id.* at 103, falls far short of establishing that such pressure, if even a function of contributions at all, are caused by candidate spending *above* Vermont's spending cap, as opposed to the need to compete for political and financial support even below the cap. And the evidence certainly does not distinguish between the influence such groups have as a function of numerous supporters, more strongly motivated members, and superior political organization from influence obtained through meager contributions.

Even where interest groups elect to "bundle" the limited individual contributions of their members or supporters, such

bundling is no more than ordinary free association, produces a net contribution tied precisely to the degree of individual support behind the "interest" represented by the bundler, and hence can hardly be deemed any more "undue" than a single contribution within Vermont's limits. *Cf. MCFL*, 479 U.S. at 258 (resources aggregated by a corporate PAC "in fact reflect popular support for the political positions" of the PAC). That individuals choose to act together to demonstrate the depth and breadth of support for an interest is the very point of the freedom of association in the first place, and is not corrupt.

Alleged "Undue" Influence of Contributors Generally. Once contributions are limited to the low per-person levels set by Vermont, there is absolutely no evidence that the *marginal* differences in amounts between contributors, or between contributors and non-contributors, results in any *undue* access or influence. Certainly there is no evidence that access to candidates is exclusively, or even significantly, a function of cash contributions. And basic common sense suggests otherwise. For example, if the non-contributing citizen was a major employer, that person would have a greater prospect of access than the lone citizen contributing a measly few hundred dollars. Likewise with newspaper reporters or editors, community leaders, campaign workers, or even family friends. It is quite novel, to say the least, for Vermont to suggest that whatever access comes from a relatively meager contribution once every two years is "undue" relative to the access that flows from myriad other considerations.[5] And even as between otherwise similarly situated citizens, there is no evidence that the larger contributor has significantly different

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[5] *See* Stephen Ansolabehere and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding that "the evidence that campaign contributions lead to substantial influence on votes is rather thin • • •. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes.").

access to candidates (or even much access at all) or that such marginal comparisons are a significant phenomenon at all.[6]

The utterly marginal comparisons offered by Vermont involve trivial differences in influence in the context of the full range of influences that exist on a candidate, and minor disparities in contributions have not been shown to be a significant factor in overall access to candidates. Having eliminated any coercive influence of large contributions, any remaining influence of small contributions does not establish a compellingly harmful kind or degree of influence.

Alleged Harms from Uncapped Expenditures. The evidence in this case likewise does not support the notion that total candidate spending, and particularly spending *above* the expenditure limits set by Vermont, has any effect whatsoever on the supposedly corrupting potential of limited contributions. At a minimum, it seems self-evident that, absent spending caps well *below* the amounts spent on recent Vermont campaigns, expenditure limits will have no conceivable connection to the *existing* and supposedly "undue" influence of contributions. Because Vermont selected spending limits designed to match past spending, 382 F.3d at 129-30, it seemingly has no interest in eliminating existing undue influence.

And even if Vermont's expenditure caps are below the hypothetically larger amounts to be spent on future campaigns, neither evidence nor logic suggests that increased campaign spending increases the influence of larger contributors over smaller ones. Rather, increased spending would force candidates to broaden their appeal beyond the limited number of maximum donors, whereas spending caps would

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[6] Even the very notion of preferential access seems absurd in most situations in Vermont. Assuming that a House member in a race already costing less than $2000 would indeed give any meaningful preference to a $200 donor as opposed to any of the merely 1000 voters needed to win election, 382 F.3d at 130-31; 118 F. Supp.2d at 471, such a donor – or ten of them – would hardly monopolize two years of the official's time.

accordingly *reduce* the necessity for smaller donors and have *no impact* on the level of influence of non-contributors. Future increases in total spending would seem to progressively decrease the value of even maximum contributions as they became smaller and smaller percentages of the total funds needed. Any individual or group, therefore, would have progressively less importance as a donor, and what would begin to matter more would be significantly expanding the *pool* of donors, not merely appealing to a select few.

Whatever marginal differences in access might be thought to come from differential contributions thus has nothing to do with the *size* of campaign expenditures, but rather with the fact that candidates can spend *any* money from contributions, thus giving those contributions value. That Vermont continues to allow spending at past levels is powerful evidence that Vermont does not actually believe that contributions below the amounts set in Act 64 are corrupting and that the Act's real interest is to limit the *amount* of speech by candidates.[7]

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[7] There is ample reason to be suspicious of the motives of Vermont's incumbent legislators in limiting the amount of candidate speech. One generally accepted lesson that has emerged from academic research on campaign finance is the notion of the declining marginal utility of dollars used on speech. After a certain level of spending, the utility of further spending declines. Incumbents, being better known to start, hit the point of declining marginal utility more rapidly than challengers. This point is not really controversial among empirical researchers. *See, e.g.*, Gary C. Jacobson, *Enough is Too Much: Money and Competition in House Elections, in* ELECTIONS IN AMERICA (Kay Schlozman ed., 1987) ("with the challenger's level of spending controlled, the effect of the incumbent's spending is, in virtually every model or election year, very small and statistically indistinguishable from zero."); John R. Lott, Jr., *Brand Names and Barriers to Entry in Political Markets*, 52 PUB. CHOICE 87 (1986); Steven D. Levitt, *Using Repeat Challengers to Estimate the Effects of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777 (1994). The incentives for incumbents in the legislature to set spending limits at a point above their own threshold, but below the threshold of challengers is thus tremendous. An example of such self-dealing was seen in the proposed voluntary spending limits included by Congress in the

Alleged Harms to Public Perception. Finally, a few words on the public perception evidence. The court of appeals accepted public opinion polls suggesting a dim public view of Vermont's elected officials and concluded that that constituted a constitutionally significant loss of confidence in democracy. 382 F.3d at 116. But the fact that the public may respond to leading questions and characterize disfavored behavior as "corrupt" should not be sufficient to establish a constitutionally meaningful appearance of corruption. Particularly where there is no evidence of actual corruption, the proper response to such opinion is to correct the misperception, not to restrict speech. Otherwise, were mere public opinion enough to justify overriding the First Amendment, it would effectively eviscerate the very purpose of a Bill of Rights, which "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court should instead insist on more meaningful indicia that the public believes certain practices are corrupt. For example, has it led them to change their votes for candidates for office? Has any candidate ever gained meaningful support by refusing to take contributions? The only evidence in that respect is the collapse of Vermont's voluntary expenditure limits because they had no electoral benefit to candidates. It would seem that while the public will tell a pollster that certain candidates are corrupt based on contributions and expen-

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1997-98 iterations of McCain-Feingold and Shays-Meehan. Evidence from three election cycles demonstrated that when challengers spent below such proposed levels, incumbents had an overwhelming advantage. Bradley A. Smith, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 69 (2001). There is no reason to think that Vermont legislators were any less self-serving in setting the limits in Act 64, or that the 10-15% differential in incumbent versus challenger spending limits is sufficient to overcome the inherent benefits of incumbency.

ditures, they do not appear to genuinely believe it, as evidenced by their actual voting patterns.[8]

D. The Genuineness of Vermont's Interest Is Doubtful Given Its Failure To First Try Non-Speech Solutions and the Radical Underincusiveness of Its Chosen Remedy.

If Vermont were genuinely concerned about such underlying economic disparities, and their ripple effects throughout all portions of society in which money plays a role, Vermont could address the problem at its source without the slightest impact on First Amendment rights – it could equalize income and wealth through taxation and redistribution. Alternatively, it could provide a tax deduction or even a direct tax *credit* for all contributions to candidates, perhaps with an aggregate cap on the total contributions each person could make in any election cycle. While those might be unpalatable and problematic solutions for many reasons, they would impose no burden on *First Amendment* rights, and hence would be a far less restrictive means of accomplishing such a goal. That Vermont has not done so suggests that its interest in equalizing influence that is a function of wealth is of questionable genuineness.

Furthermore, on Vermont's own reasoning, the remedy it has selected is wildly under-inclusive as its alleged interest extends well beyond candidate spending. Vermont's theory,

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[8] Indeed, public confidence or views on corruption seem to have little to do with campaign finance at all. *See* Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.")

flawed as it is, seems to argue that preferential access available to contributors generally, and to large contributors over smaller contributors, stems from elected officials' need for large amounts of campaign funds and hence the high value of contributions (and especially maximum contributions) given such demand. Expenditure limits, so the theory goes, would limit the demand for, and hence the value to elected officials of, campaign contributions.[9] (How such a limited decrease in the *overall* value of contributions would alter the *differential* value between large and small contributions is never explained.)

What is unusual about this theory is that the corruption linkage applies only to incumbents, not challengers, and could be solved by a rule applicable only to incumbents or even by single-term limits for holding office. In any event, Vermont applies its limits to challengers as well as incumbents presumably out of some sense of fair competition – self-serving and non-compelling as that rationale may be. That logic extends even to a self-financed challenger. Even though such a challenger cannot corrupt himself nor needs to rely on contributors or give them any preferences, his spending would presumably pressure the incumbent to favor contributors in order to compete. Thus, in order to stop the potential corruption of incumbents, Vermont has restricted the core and utterly harmless speech of wholly innocent challengers. As radical as that result is, Vermont's theory goes further.

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[9] Vermont's expenditure limit measure would not by itself lessen a candidate's *demand* for cash, particularly if the candidate is a challenger, unknown, or unpopular with the media. Rather, the candidate is simply disabled from satisfying that demand and would correctly feel that Vermont has tied her hands and limited her right to speak on her own behalf with such resources as the contribution limit regime would otherwise allow her. Hence we see, as noted by Judge Winter in dissent, the spectacle of a sponsor and coauthor of Act 64 who has now filed to declare his own legislation unconstitutional. *See* 382 F.3d at 158.

Capping the spending of opposing candidates will not by itself serve the interest claimed because Vermont presumes, erroneously, that the pressure on a candidate to solicit additional contributions comes only from the fundraising prowess of her opponent. But a wealthy *individual* could run an independent ad campaign for a challenger or against an incumbent, and that too would force the candidate to solicit additional contributions, or suffer the "unfairness" of being unable to respond. To relieve this pressure and unfairness, as in the case of challenger spending, Vermont would presumably have to limit the independent expenditures of all wealthy individuals in Vermont, a still further radical departure from precedent, but no less related to the alleged interests here than what Vermont has already done. Similar reasoning applies to independent spending by PACs; to spending by MCFL corporations; or to a program, editorial, or story running on a Vermont television, cable, or radio station or in any of several newspapers. Each of those sources could generate the same pressure on an incumbent to respond and to solicit contributions for that purpose; and if such further spending were forbidden, to ask that the opposing entities likewise be limited in their expenditures in the name of fairness, as some academics have suggested. *See* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (egalitarianism requires reconsidering the media exception to otherwise applicable campaign finance laws); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994) (proposal to treat media enterprises the same as are other corporations under campaign finance law).

Even viewing the interest and remedy in a light most favorable to Vermont, it cannot be achieved unless the Court would countenance many such measures in the future. That is the implication of Vermont's alleged interest, and it is a radical departure from First Amendment jurisprudence indeed. And while past restrictions in the campaign finance area de-

pended on a nexus between the practice being restricted and an office-holder, Vermont would stretch the notion of such a nexus to include anything or anyone to which an office holder felt the need to respond via costly speech, thus driving the need to raise money to respond. The breadth of Vermont's interest thus goes far beyond the already remarkable breadth of Act 64. That should cause this Court to reject enshrining such an interest as "compelling" and thus inviting such expansive restrictions in the future.

In sum, there is no existing relevant precedent that would not be radically altered or jettisoned if the Court were to uphold this measure. Vermont is free to experiment with the dollar values of its contribution limits and the anti-circumvention measures previously recognized by the Court to reach a proper balance. To uphold expenditure limits, however, would be to enshrine monetary equality as a constitutional maxim and to subject all politics to government control. But such a result is neither wise nor necessary because money is not an illegitimate resource in the political marketplace, even where its deployment is not always equal.

III. The Claimed Interest in Reallocating Candidate and Office-Holder Time Is Neither Compelling Nor Supported by a Proper Review of the Record.

Vermont's purported interest in "'assur[ing] that candidates and office holders will spend less time on fundraising and more time interacting with voters and performing official duties,'" 382 F.3d at 120 (citation omitted), is peculiar, at best, in that it places the State in the role of arbiter of which competing First Amendment activities – solicitation and advertising or personal voter interaction – are valuable and permissible for candidates, yet it does nothing to "assure" that candidates will actually spend any of their newly "protected" time on such preferred speech activities or on official duties.

It would appear, therefore, that Vermont simply dislikes the nature of modern political communications that rely heav-

ily on broad, though perhaps less personal, appeals and advocacy, and thus wishes to suppress them to some degree, regardless of what replaces them. Such an interest in suppressing disfavored modes of speech or in reallocating such speech as occurs is neither compelling, nor supported by the record.

A. Reallocating Candidate and Office-Holder Time Spent on First Amendment Activities Is Not a Compelling Interest.

Of the several aspects of Vermont's alleged time-protection interest, the notion of protecting office-holder time is simultaneously appealing and non-compelling. It is appealing in that there is undeniably a legitimate interest in having office holders spend all necessary time on their official duties. But it is not compelling in a number of ways.

First, it is, at best, nebulous and knows no bounds. Office holders have a variety of competing demands on their time, each of which may keep them from attending to their official duties to an optimal degree. Family demands, business interests, social engagements, or the mere desire to play golf all take time that might otherwise be spent on official duties. Likewise, the demands of campaigning, in whatever form or mode, will compete with an office holder's official duties, and it is inevitably the hard choice of the public official to decide whether his reelection chances are best served by spending time improving his performance in office or by campaigning for another term in office. If the interest in having office-holders spend more time on their duties were indeed *compelling*, it would seem to justify any number of regulations of anything that might compete for an office holder's time. Restrict family life or marital status? Why not, if the interest is truly *compelling*? Ban or severely restrict their *time* spent campaigning? That is certainly the next logical step. Indeed, given that Vermont claims to be concerned with the "arms race" to which office holders must respond, why not cap third-party independent expenditures as

well, especially on legislative issues, given that office holders would need to respond to such speech and hence be distracted from their duties. The alleged interest thus proves too much, and hence is far too general to be a compelling interest that can justify restrictions on core speech.

Second, the interest in official duties also proves too little to serve as a justification for Act 64. At a minimum, it plainly does not apply to spending by challengers not already holding state office. Their time will not go to official duties regardless, and hence protecting it seems rather meaningless. While it is true that a one-sided restriction on incumbent fundraising might seem unfair, any real unfairness is hardly self-evident given the inherent advantages of incumbency. That an office holder's job may constrain the time spent raising funds and campaigning for reelection seems to be a simple consequence of having assumed the greater duties of office, and should not be bootstrapped into a reason for restricting the speech of challengers. Intervening in the inherent balance of advantage and disadvantage as between challengers and incumbents in the name of "fairness" is quite a different interest, hardly seems compelling, and is distinctly *not* a task to be trusted to the incumbents themselves.

Third, while having office-holders perform their duties is a legitimate concern, the fact that Vermont has not taken more direct steps to accomplish that goal would seem to undermine its strength and the genuineness of Vermont's concern. Vermont could have done what every employer does with similar concerns – impose work hours and other obligations, require office holders to spend time at the state-house, require them to hold "office hours" for constituent service, and forbid them from conducting non-official business during working hours. While that seems rather heavy-handed, it is certainly less restrictive of First Amendment rights, however much it might bruise the sensibilities of elected officials.

Fourth, simply freeing up office-holder time offers no assurance that the time will indeed be spent on official duties as

opposed to anything else. That lack of assurance again undermines the genuineness of the interest, or at best converts it into the far more attenuated interest of giving office holders the *option* to spend more time on their duties. Furthermore, given that the means by which Vermont has approached this interest – limiting the most efficient means of communicating with large audiences of voters – office holders wishing to recoup some of the lost effectiveness of their campaign speech may in fact have to spend *more* time campaigning, and less time on official duties. The contradictory claimed goals embedded in this alleged interest thus lead one to question whether either goal is genuine.

As to the second aspect of the time protection interest – reallocating time to more desirable forms of personal political speech – Vermont's interest is affirmatively invalid.

First, this interest, of course, has nothing to do with the total time a candidate spends on speech, but rather with channeling a candidate toward a particular *type* of speech and away from solicitations and 30-second ads. But deciding what type of speech is best, either for candidates or for voters, is reserved for the speakers and the listeners themselves, and the claimed interest in overriding those choices is no interest at all. *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.").

Second, the interest, once again, knows no limits and hence would sweep too broadly to fit within the scheme of strict scrutiny. If the State can choose between solicitations coupled with television time and personal interaction by the candidate, there seems no reason it cannot decide that voters really need direct debates, and require that of candidates as well. Or perhaps the State could decide negative campaigning is not valuable and could ban, or severely burden, such speech. At bottom, an interest in deciding what speech is best

for candidates or the public is simply a rejection of the First Amendment on its face, it is not a cause to override it.

Third, the interest in reallocating speech is particularly non-compelling where the State disfavors methods of speech that the candidates themselves find most efficient and effective and forces candidates into speech that will not work as well or reach as far. That suggests that the State is actually trying to suppress the total quantity and reach of speech, to the detriment of the public that will now receive less speech, and to the detriment of challengers, who, as discussed earlier, reach the point of declining marginal utility of speech later than incumbents, and who require substantially more speech to overcome the advantages of incumbency. Notwithstanding the State's protestations that direct interaction with voters is superior and inspires confidence, that judgment is for the voters and candidates themselves, and to the extent any incumbent actually believes it, she can try it voluntarily in an election. The fact that few if any seem to have done so – recall the abandonment of voluntary spending limits – suggests that the legislators do not believe their own alleged interests.

Finally, reallocating candidate time away from more costly, yet more effective, forms of communication simply cedes the playing field to third parties with access to such communication. Candidates and issues will now be defined by the broader speech of others, whether from the mass media or independent expenders, rather than by their own speech, with inevitable resulting distortions.

Overall, therefore, the time-protection interest asserted by Vermont is non-compelling and in a variety of ways is affirmatively offensive to the First Amendment.

B. The Record Does Not Support a Significant Danger of Improper Time Allocation by Candidates and Office Holders.

As for the evidence allegedly supporting the time-protection interest, aside from some self-serving statements

by incumbents, 382 F.3d at 122-23, little evidence demonstrates that the caps would in fact reduce time spent on fundraising or that such time would be shifted to more valuable uses. At best the evidence might suggest an *opportunity* for such shifts, but missing is any evidence that time is actually diverted from official duties or "superior" speech. Thus, there is no evidence that candidates who spent and raised less money put their time to more valuable uses, either on official duties or on preferred modes of speech. Nor is there evidence that candidates in the past, when spending was supposedly lower, spent more time on preferred activities. Likewise, there is no evidence that in the few years that voluntary spending caps were followed there was any beneficial effect. And the eventual abandonment of those voluntary caps would at least suggest that candidates did not believe that they had better alternative uses for their time. The fact that there are numerous means to test and prove Vermont's hypothesis regarding the relation between candidate spending and candidate time allocation, yet there is no evidence from such available tests, strongly undermines the self-interested claims of incumbents that Vermont chooses to rely upon instead.

The dearth of evidence that the harms perceived and the benefits claimed are real, not mere conjecture, means that the State has failed to establish a compelling interest sufficient to justify its radical restriction on speech.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit finding Vermont's alleged interests compelling and remanding for further consideration should be reversed, the interests should be found non-compelling, and Act 64's candidate expenditure limits should be declared unconstitutional.

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In the

Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT AT AMERICAN UNIVERSITY IN SUPPORT OF RESPONDENTS

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Interest of Amici Curiae[1]

Amici Curiae include noted experts on campaign finance law and practice, election administration, and international democratization. Amici possess many years of experience working to understand, defend, advance, and deepen election systems, civil society, and democratic institutions in the United States and abroad. They are political scientists and lawyers at the Center for Democracy and Election Management at American University in Washington, D.C.

The Center for Democracy and Election Management (CDEM) is an academic institution at American University, dedicated to the training of undergraduate and graduate students and mid-career professionals in the management of elections and best democratic practices, as well as the scholarly research of electoral administration, election system design and reform, and democratization. The mission of CDEM is education, training, research and support for individuals and institutions engaged in the democratic process and its improvement. It directed the Commission on United States Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, and has done extensive comparative work on election systems internationally.

CDEM is joined by the following elections experts:[2]

Dr. Robert A. Pastor (Director, Center for Democracy and Election Management, Vice President of International Affairs, and Professor at American University;

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] John Henderson undertook much of the research and the preparation of the first draft. Pastor and Raskin supervised the research and the drafting and edited the drafts and the final paper.

former Fellow and Founding Director, Latin American and Caribbean Program, The Carter Center);

John Henderson (Junior Fellow, Center for Democracy and Election Management, and Research Associate, Office of International Affairs, American University); and

Jamin Raskin, Professor, Washington College of Law, American University.

The long-running debate over whether to restrict election campaign expenditures has focused on whether such limitations would harm the practice of democracy — specifically, whether free speech would be limited, whether competitiveness would be diminished, and whether campaigns would be distorted, *i.e.*, not free or fair. Since such restrictions have not been implemented nationally in the United States and local examples are few and recent, it is difficult to answer these questions just by looking at the United States. The interest of Amici is to draw the best evidence from democracies abroad, particularly in those countries with traditions and institutions most like those of the United States. We do not claim that those experiences should guide American policy, but we do believe that it would be a grave omission not to study those cases and try to inform the U.S. debate as to the effects of restrictions on campaign expenditures in other countries.

Summary of the Argument

The Watergate scandal and the resignation of President Richard Nixon in 1974 led Congress to consider and approve far-reaching campaign finance rules, and those developments led other countries to review and modernize their own campaign finance rules. Though the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) accepted limits on contributions but not on expenditures, numerous other democracies introduced ceilings on both. As the Supreme Court revisits the question

of limits on campaign spending in this case, three decades of experience and a wealth of data are available from abroad for the court to assess regarding its possible impact in the United States.

Several conclusions emerge from examining the experience of other democracies with campaign spending limits:

- Spending limits certainly do not impair, and may even enhance democracy, electoral competition, and free speech and association, while clearly reducing the influence of money in politics.
- A majority of the freest, most democratic, and economically advanced countries in the world regulate campaign expenditures and contributions.
- In comparison, low-income and new democracies are less likely to do so.

Evidence from America's democratic colleagues suggests that common assumptions undergirding the case against limiting campaign expenditure in the United States are questionable, if not wrong. Let us review the evidence regarding each argument.

Argument

I. Campaign Spending Limits Do Not Hurt and May Even Enhance Democracy Abroad

A. Expenditure Limits Do Not Reduce Electoral Competition Nor Do They Disadvantage Challengers

The experience of democracies abroad with the best records on civil rights and freedoms, like Canada, the United Kingdom, and New Zealand, indicates that expenditure limits do not reduce and may even enhance the competitiveness of elections.

Election data at the constituency level, and a comparison of the specific campaign finance regulations in eight common law democracies for the period between 1997 and 2005, show that countries with limits on expenditures (Canada, the United Kingdom, New Zealand, and Malta) had more competition than those that lacked such limits (United States, Jamaica, Ireland, and Australia).[3] We define "competition" in

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[3] *See* Canada Elections Act, S.C. 2000, c. 9, § 441 (Canada), available at <http://www.elections.ca/loi/ref/act.pdf>; Political Parties, Elections, and Referendums Act, 2000, ch. 41, §§ 72-95, Sch. 9 (UK), available at <http://www.opsi.gov.uk/acts/acts2000/20000041.htm>; Electoral Act, 1993, §§ 213, 214B (N.Z.), available at <http://rangi.knowledge-basket.co.nz/gpacts/reprint/text/2005/an/031.html>; Malta: Chapter 102, The Electoral (Polling) Ordinance, available at <http://docs.justice.gov.mt/lom/legislation/english/leg/vol_3/chapt102.pdf >; The Commonwealth Electoral Act, 1918, 2004 (Australia), available at <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D0B22ED3162E922DCA256F71004E6776/$file/CwlthElectoral1918.pdf>; The Representation of the People Act (Jamaica), available at <http://www.eoj.com.jm/legislation/ropa.htm>; Electoral Act, 1997 (Ireland), available at <http://www.irishstatutebook.ie/ZZA25Y1997.html>; Law Library of Congress, *Campaign Financing in Various Foreign Countries, Comparative Summary and Analysis* (Document No. 2002-14013) (2002) (surveying the laws of eighteen countries, including Australia, Canada, and the United Kingdom). Although Ireland limits candidate

terms of four criteria, including incumbent reelection rate and percent of uncontested races.

The Watergate scandal inspired those democracies most similar to the United States to cap both spending and contributions for parties and candidates. These countries concluded that both sets of limits in place allowed a greater ability to influence the impact of money on campaigns. Though there is no simple way to eliminate this influence, the United States has found it more difficult to reduce the influence of money in its elections because it has been able to restrict only one side of the equation — contributions — rather than expenditures. Experience from abroad suggests that the best way to regulate campaign finance is to address both expenditures and contributions.

The specific expenditure limits in Canada, New Zealand, and the United Kingdom are:[4]

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expenditures, it does not limit party expenditures on elections. *See* the International Institute for Democracy and Electoral Assistance handbook (2001), "Funding of Political Parties and Election Campaigns," ("IDEA") at 206, available at <http://www.idea.int/publications/funding_parties/upload/full.pdf>. Although Jamaica limits candidate expenditures, there are no formal limits on party expenditures and candidate limits are not enforced. *See* Steven Griner and Daniel Zovatto (2005), "From Grassroots to the Airwaves: Paying for Political Parties and Campaigns in the Caribbean," Organization of American States, available at <http://www.ddpa.oas.org/publications/2005/fiapp/grassroots_airwaves/doc/pbl_grassroots_002_05_cng.pdf>. For an in-depth discussion of Australian campaign finance laws, and how they compare to laws in the United Kingdom and in Canada, *see* Talina Drabsch (2005), "Election Finance Law: An Update," Research Service Publications, available at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/08aa07f33136c901ca2570bd0003cb5c/$FILE/Election%20Finalpaper.pdf>.

[4] Data on campaign finance regulation is found in the IDEA. *See* n.3, *supra*. A summary of expenditure limits on political parties is at 205-208. The average size of a constituency in these countries (population divided by the number of legislative districts or congressional seats) is 38,696 for New Zealand, 70,811 for Canada, and 68,735 for the U.K. *See* U.S.

(a) *Canada*: the expenditure limit for parties fielding candidates in all 308 electoral districts in the 2004 election was $15,311,868; candidate expenditure for that election was limited at about $52,412 to $84,849 depending on the population of the district.[5]

(b) *New Zealand*: the expenditure limit in the 2005 election for parties fielding candidates in all 69 electoral districts was $2,336,000; the limit for candidates was $13,750.[6]

(c) *United Kingdom*: the expenditure limit in the 2005 election for parties fielding candidates in all 646 electoral districts was approximately $35,000,000; the limit for candidates was approximately $14,000.[7]

Of the eight common law democracies, each country that regulates expenditures (Canada, the United Kingdom, New Zealand, and Malta) also places limits on contributions, while Ireland and the United States limit only contributions, and

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Census Bureau, "International Data Base," available at <http://www.census.gov/ipc/www/idbnew.html>; CIA, "The World Factbook," available at <http://www.cia.gov/cia/publications/factbook/>. Of course parties and party funding play a more prominent role in parliamentary democracies and thus parties strategically use party funds in constituency races.

[5] *See* Elections Canada, "Election Handbook for Candidates," available at <http://www.elections.ca/content.asp?section=pol&document=index&dir=can/EC20190&lang=e&textonly=false>. All figures are transformed into U.S. dollars at the most current rate of exchange.

[6] Elections New Zealand, "Election Expenses and Returns," available at <http://www.elections.org.nz/elections/e5_party_return_expenses.html>.

[7] *See* Richard Kelley, "Election Expenses Limit," <http://www.parliament.uk/commons/lib/research/notes/snpc-03413.pdf>.

Australia and Jamaica regulate neither.[8] The different ways in which democracies most similar to the United States regulate campaign spending have important implications for electoral competition in these countries.

There are four widely used measures of electoral competitiveness: average size of electoral majority, percent of competitive races, incumbent reelection rate, and percent of uncontested races. Significantly, these show that U.S. legislative elections are much less competitive than elections held in other common law democracies.

An *electoral majority* is the difference between the winning candidate's percent of the vote and the vote percent of the next largest vote-getter. The smaller this difference is for any single race and for all races in an election, the more competitive the election is overall. Averaging each candidate's winning majority for each constituency, therefore, provides a measure of the overall competitiveness of an election.

FIGURE 1 reveals that 4 of the 5 countries (Canada, Malta, New Zealand, and the United Kingdom) with the most competitive elections (smallest average majorities of legislative race winners) place ceilings on candidate and party spending, and that all three of the countries with the least competitive elections (Ireland, Jamaica, and the United States) do not regulate overall spending. Moreover, countries with limits on expenditures average winning majorities of 20.71% across all of their elections as compared with average majorities of 25.45% in countries that do not regulate campaign spending. In other words, among this group, candidates in an average legislative race in countries *without* limits win elections by

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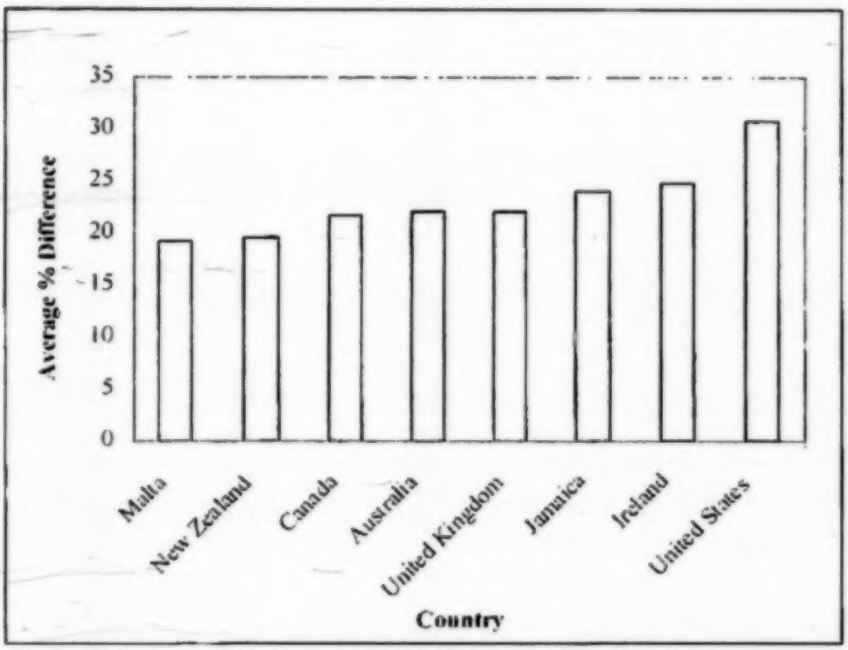
[8] Again, Jamaica (at least on paper, if not in practice), and Ireland regulate candidate, but not party expenditures. *See* n.3, *supra*.

greater majorities with less competition than in countries with spending limits.

Whatever the cause of greater competition, one cannot make the argument that capping expenditures automatically reduces competition because these cases suggest the opposite.

Figure 1: Electoral Competition in Eight Common Law Democracies, 1997-2005[1]

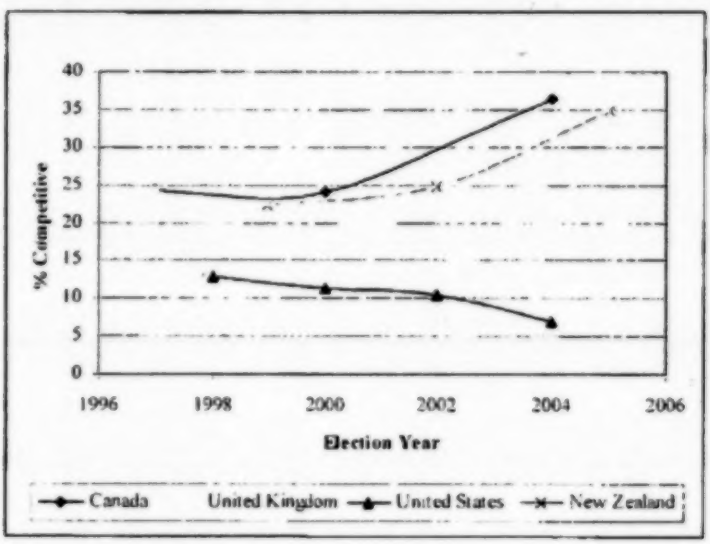


[1]**Average % Difference** is a measure of the size of the electoral majority of each winning legislative candidate over her nearest competitor. To calculate the statistic, each winner's percent of the vote is subtracted from the vote percent of the next largest vote-getter. These percent differences are then averaged. Smaller winning majorities mean more competition. U.S. elections include both House and Senate races.

Source: Australian Electoral Commission, <http://www.aec.gov.au/>; Elections Canada, <http://www.elections.ca/; Elections Ireland, <http://www.environ.ie/>; Jamaica Elections, <http://lanic.utexas.edu/la/cb/jamaica/>; Malta Elections, <http://www.maltadata.com/>; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives,<http://clerk.house.gov/>.

Another useful indicator of competitiveness is the percentage of all legislative races decided by fewer than 10% of the voters. FIGURE 2 below reports this measure of competitiveness across elections held by Canada, New Zealand, the United Kingdom, and the United States between 1997 and 2005.[9] The percentage of competitive races in countries with expenditure regulations (Canada, New Zealand, and the United Kingdom) appears *not* to have changed very much and the little that was changed was in a positive direction (*i.e.*, more offices were decided by close elections) between 2000 and 2005. Further, it is interesting to note that the competitiveness of elections in the United Kingdom increased slightly in 2005 just after the adoption of spending ceilings. By comparison, elections in this country are quite uncompetitive and over time have become even less so. For instance, in Canada's 2004 election, 36.5% of all constituency races were competitive; in the same year in the United States, only 7.0% were competitive.

Figure 2: Electoral Competition in Four Common Law Democracies, 1997-2005[1]



[9] Australia, Ireland, Jamaica, and Malta are excluded from further analysis because of the sporadic availability of district-level election data for the period.

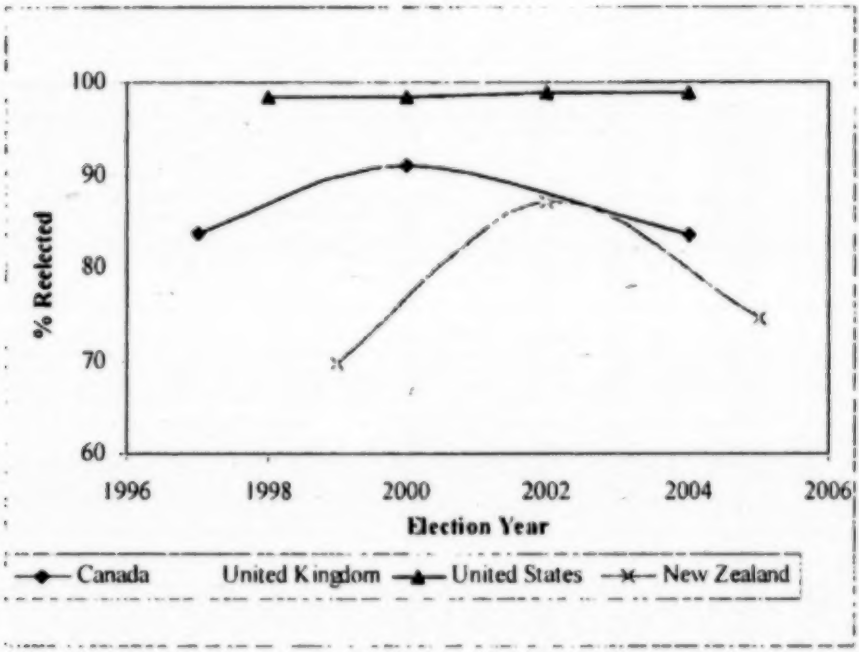
[1]**% Competitive** is the percentage of the legislative races (excluding uncontested races) in an election for which the winner is determined by a majority of less than 10% of the votes. U.S. elections include both House and Senate races.

Source: Elections Canada, <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

Even these two measures of electoral competition (average percent difference and percent competitiveness) do not fully capture the truly uncompetitive character of legislative races in the U.S. Two additional measures (incumbent reelection rate and percent of uncontested race) better illustrate the lack of competitiveness in this country.

The rate of incumbent reelection in Congress (see Figure 3 below) exceeds that found in all the other common law democracies with expenditure limits by substantial margins. By comparison, incumbents are reelected in the other common law democracies on average 83.1% of the time. Only the United Kingdom comes close to sharing the sort of incumbency election rates seen in the United States (around 99.0%), as in 2001 when 96.7% of British incumbents were returned to parliament. Yet not only are incumbents in the United States reelected far more often than in other countries, but a significant percentage of them go unchallenged in every election cycle. Over the last four legislative elections in the United States, 17.6% of incumbents went unopposed. Yet in the three most recent elections organized by each of the other three common law democracies, *every* constituency race was contested by multiple candidates. If in the United States the percent of a winner's majority in an uncontested race is understood to be 100.0%, then the average majority over the four most recent legislative elections would be 43.0%. Elections in the United States are far less competitive than in countries with spending limits.

Figure 3: Incumbent Reelection in Four Common Law Democracies, 1997-2005



% Reelected is the percent of incumbents returned to office that sought reelection. U.S. elections include both House and Senate races.

Source: Elections Canada, <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K. <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

The United States lags behind common law democracies in conducting elections that are contested and highly competitive (see Table 1 below). Whatever may account for this difference in the levels of competitiveness between the United States and the other common law democracies, it is clear that expenditure limits do not reduce competition. Indeed, elections in these three countries that restrict expenditures are more competitive than those in the United States, which does not.

Table 1: Competitiveness of Elections in Common Law Democracies, 1997-2005[1]

Country Election Year	Competition Index (a) avg. % diff.	Competition Index (b) % races <20%	Competition Index (c) % races >30%	Uncontested Elections % of total	Incumbent Reelection % reelected
Canada	**21.71**	**53.3**	**27.8**	**0.0**	**86.1**
1997	20.83	56.3	24.7	0.0	83.7
2000	23.84	47.7	31.3	0.0	91.0
2004	20.45	56.0	27.4	0.0	83.5
United Kingdom	**22.13**	**51.0**	**27.0**	**0.0**	**86.1**
1997	24.21	49.0	34.0	0.0	72.3
2001	22.85	49.0	28.0	0.0	96.7
2005	19.34	55.0	19.0	0.0	89.3
United States[2]	**30.76**	**28.5**	**51.0**	**17.6**	**98.7**
1998	29.60	36.1	44.9	21.8	98.5
2000	31.15	29.1	52.6	15.2	98.5
2002	31.24	25.0	54.7	18.6	99.0
2004	31.05	23.7	51.9	14.9	98.8
New Zealand	**19.70**	**52.6**	**18.5**	**0.0**	**77.1**
1998	20.85	47.8	19.4	0.0	69.6
2002	21.60	50.7	27.5	0.0	87.0
2005	16.65	59.4	8.7	0.0	74.6

[1]Data covers 3 or 4 legislative elections from each country.

[2]Includes both House and Senate races.

Source: Elections Canada, available at <http://www.elections.ca/; Elections New Zealand, available at <http://www.elections.org.nz/>; The Electoral Commission, U.K., available at <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, available at <http://clerk.house.gov/>.

B. There is No Evidence that Expenditure Limits Impair Freedom of Speech or the Press

The evidence from democracies abroad suggests that expenditure limits do not weaken civil and political rights or free speech and the press. Democracies that limit campaign spending safeguard their citizens' rights, liberties, and

freedoms, and for every year between 1995 and 2004, countries with expenditure limits on average earned higher "freedom scores" (according to Freedom House) than countries without the ceilings.[10] In fact, no democracy experienced a decline in its score for protecting free expression after introducing limits on expenditures, and some have actually seen marked improvement. Thus, it is not surprising that no successful challenge has yet been lodged against party and candidate spending provisions in any other democracy, nor has any court of highest appeal determined that limits on party or candidate expenditures reduces free speech or association.[11]

Freedom House (FH) annually judges the status of freedom for each country in the world, by assessing the degree to which a country fosters the norms and institutions that are fundamental to a free society. A "freedom score" is constructed accordingly to how well a country performs along two dimensions, *political rights* and *civil liberties*, and is based on a scale of 1 to 7 (most to least free). Countries with a score of 1 organize free and fair elections with multiparty competition, encourage free speech and press, protect minority rights, and support an equitable system of rule of law. The FH score is widely employed in political science research as one of the most authoritative, comprehensive, reliable, valid, and precise measures of freedom and democracy available. Amici base the subsequent analysis on a

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[10] Freedom House (FH) is a non-governmental organization that "supports the expansion of freedom in the world." *See* <www.freedomhouse.org>.

[11] Our thorough search for all available dates for Commonwealth and Foreign Nations (including Australia, Canada, New Zealand, and the United Kingdom) produced no cases in which a higher court held that campaign expenditure limits are *per se* unconstitutional. The closest case is *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, in which the Canadian Supreme Court *upheld* the constitutionality of restrictions on "third-party" spending.

sample of 84 "free" democracies by cross-referencing the FH "Freedom in the World" data with the campaign finance data compiled by IDEA, a Stockholm-based, non-governmental organization dedicated to democracy promotion.[12]

Levels of freedom in democracies with spending limits are high and improving. From 1995 to 2004, countries that limited campaign expenditures averaged political rights and civil liberties scores of 1.25 and 1.86, respectively, for a sum score of 3.11. Lower FH scores indicate greater freedom. (See Figure 4 below.) Democracies that adopted limits on expenditures also became freer over the period, witnessing a 9.7 percent increase in freedom (from a score of 3.07 to 2.77). If expenditure limits adversely affect free association and expression as some claim, then this trend should have been reversed or the scores should have reflected lower than average levels of freedom.

Figure 4 also shows that countries with limits on spending consistently garnered better freedom scores than those without limits for each year and for the period as a whole. Democracies without expenditure limits have average scores in political rights and civil liberties of 1.52 and 1.99 for the period, with a sum score of 3.51. Thus, on average, according to the most authoritative, comprehensive, reliable, valid, and precise measure of freedom used by political scientists, countries with campaign ceilings were actually 11.4 percent freer. The data suggest that campaign spending limits do not impair free speech and association.

In addition, no single democracy that regulates campaign spending witnessed a diminution, and some even experienced improvement in freedom. Indeed, the gains in freedom observed in Figure 4 above may be largely explained by examining four new democracies and their experience with

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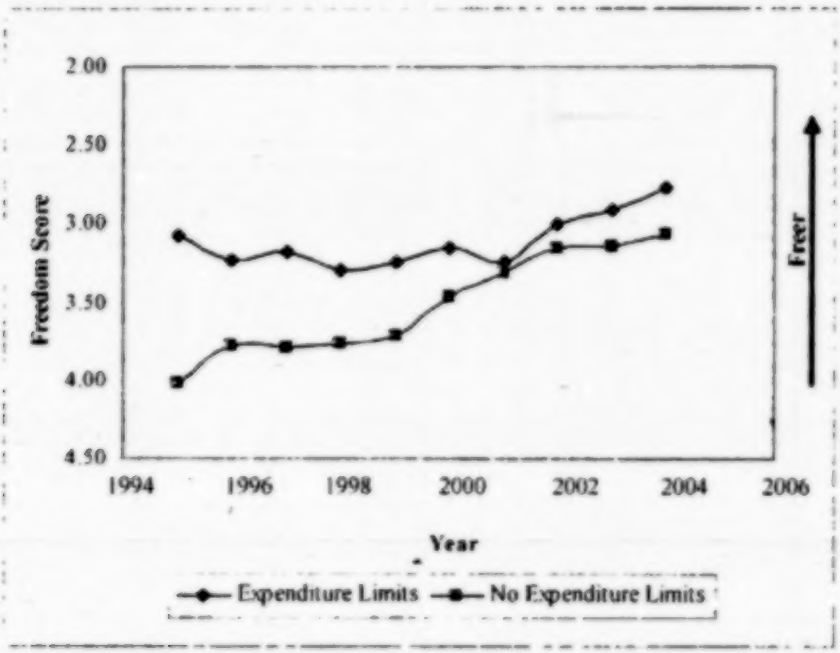
[12] IDEA (2001), "Funding of Political Parties and Election Campaigns."

spending limits. As Figure 5 illustrates, the protection of political rights and freedoms, including free speech and the press, improved in Brazil, Mexico, Taiwan, and Thailand either in the year expenditure limits were introduced or in the year of an election where the limits were first enforced. The United Kingdom also improved in 2001, the year in which the country overhauled its campaign finance system and introduced ceilings on spending. Though these gains are doubtless the result of a complex set of events that have reshaped democracies throughout the world, it is nonetheless revealing that improvements and not declines occurred in these countries in the very years that spending limits were adopted.

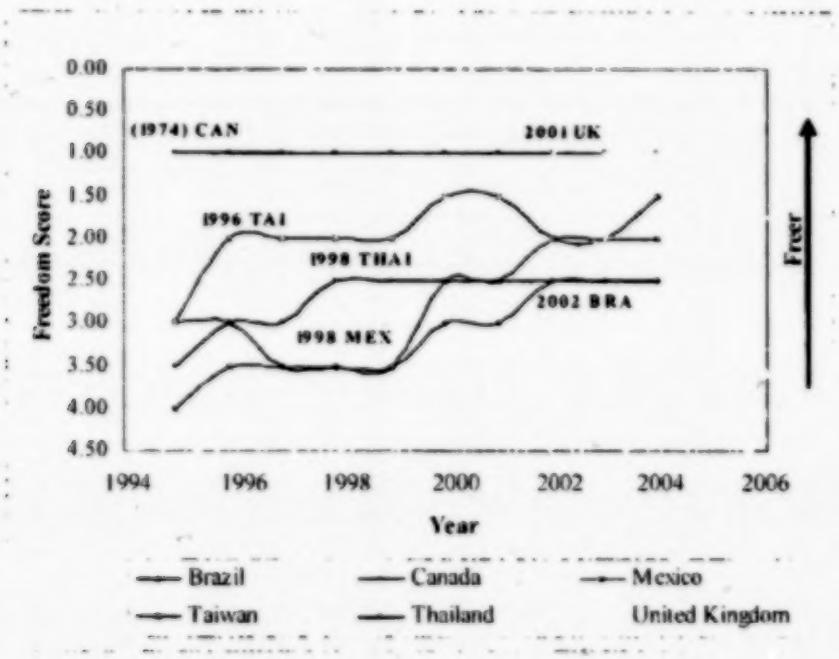
Figure 4: Freedom in Democracies with Expenditure Limits, 1995-2004[1]



[1]Freedom Score averages the countries' scores for political rights and civil liberties each and then sums the averages together into a composite score in order to minimize the differences between two populations.

Source: Freedom House (2005). "Freedom in the World," available at <www.freedomhouse.org>.

Figure 5: Levels of Freedom After Adopting Expenditure Limits, 1995-2004[1]



[1]Freedom Score takes the average of a country's political rights and civil liberties score.

Source: Freedom House (2005). "Freedom in the World," available at <www.freedomhouse.org>.

Another revealing finding is that among all of the democracies abroad with a tradition of judicial review, no court of highest appeal has come to the conclusion that spending limits are a *per se* violation of rights of free speech, association, or press freedom. Canada's campaign finance jurisprudence is of particular interest. Canada adopted spending limits for parties and candidates with the Elections Expenses Act of 1974, and subsequently extended the limits for nomination races in 2003. *See* Canada Elections Act, S.C. 2000, c. 9,[13] amended by S.C. 2003, c.19. Yet no direct constitutional challenge to the expenditure limits themselves has ever succeeded in any Canadian court of appeal.

[13] Available at <http://www.elections.ca/loi/ref/act.pdf>.

In 1974 alongside the party and candidate spending ceilings, the Canadian parliament also prohibited third-party groups from spending money to directly support or oppose candidates or parties, though the government did not regulate money spent to promote political issues. This restriction on third-party spending sparked a series of legal challenges spanning two decades, which were finally decided in *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827. In *Harper*, the Supreme Court of Canada upheld the constitutionality of regulating interest-group spending, which at the time was capped at $3,000 per candidate and $150,000 for all election-related spending on candidates and parties. The Court held that limits in general did not violate citizens' freedom of expression, right to vote, or freedom to associate.[14]

The fact that no challenge has yet been lodged against party and candidate spending provisions reveals a remarkable consensus on their constitutionality among the countries' legal and political leadership. This consensus appears to be shared among the leaders of the other democracies abroad. Ironically, even though the Watergate scandal and the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 15, 18, 26, 47 U.S.C.), motivated many democracies to adopt their own spending limits, no higher court has since followed the arguments set forth in *Buckley* in striking down their constitutionality.

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[14] *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0827.html>.

II. Politically Advanced and Economically Developed Democracies are More — not less — Likely to Limit Expenditures and Contributions

Countries with the finest democratic traditions, that are most similar to the United States in institution and history, like Canada, the United Kingdom, and New Zealand, and that are highly developed, are precisely the ones that typically regulate expenditures and contributions. Of the 84 "free" democracies, 65 or 77.4% have campaign finance regulations.[15] Moreover, 53.8% or 14 of 26 advanced democracies limit contributions, expenditures, or both.[16]

In comparison, only 32.8 percent (19 out of 58) of *new* democracies regulate contributions, expenditures, or both. As these democracies become more consolidated, they are more likely to adopt limits on campaign expenditures and contributions.

Countries with expenditure and contribution limits are also more advanced economically. The average income (GDP/capita) of a democracy that limits expenditures, contributions, or both is $17,705 as compared with an income of $13,084 for a democracy without the limits. This confirms other evidence — that economic as well as political development increase the chances that a democracy will adopt expenditure

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[15] Regulations here include expenditure and contribution limits and direct and indirect forms of public campaign finance. If disclosure and other provisions are considered, the percentage of countries with some form of campaign finance regulation increases. IDEA (2001), "Funding of Political Parties and Election Campaigns," available at <http://www.idea.int/publications/funding_parties/upload/full.pdf>.

[16] Advanced democracies are those that were established before 1970. New democracies are those that were established after 1970. Some of the other democracies that limit expenditures include Belgium, France, Israel, Italy, Spain, and Portugal.

and contribution ceilings to combat the rising costs associated with running a campaign.[17]

Conclusion

Buckley v. Valeo appeared to equate campaign expenditures with free speech, implying that limiting the first would also limit the second. Because of that ruling, the United States does not have the experience to test the validity of the equation, but there are many experiences abroad that allow us to draw some conclusions. In this brief, we have surveyed those cases, focusing particular attention upon those countries with political traditions and institutions most like those of the United States. We have found no evidence that limits on campaign expenditures impair the freedom of speech. Indeed, the evidence points in the opposite direction: those countries that have restricted campaign spending have higher levels of political freedom, and those that have adopted such restrictions have improved their levels of freedom. If the United States limits campaign spending, there would be no guarantees that freedom and competition would be enhanced, but fears of a loss of freedom and competition are clearly unwarranted.

Respectfully submitted,

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[17] IDEA (2001), "Funding of Political Parties and Election Campaigns," pp 173-176; Herbert Alexander (1994), *Comparative Political Finance Among the Democracies*, Boulder: Westview Press, pp 1-11.

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Nos. 04-1528, 04-1530 and 04-1697

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court Of The United States

NEIL RANDALL, et al.,
Petitioners,
v.
WILLIAM H. SORRELL, et al.,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, et al.,
Petitioners,
v.
WILLIAM H. SORRELL, et al.,
Respondents.

WILLIAM H. SORRELL, et al.,
Cross-Petitioners,
v.
NEIL RANDALL, et al.,
Cross-Petition Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, ARKANSAS, CALIFORNIA, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, RHODE ISLAND, WISCONSIN, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Cross Petitioners and urge this Court to affirm the judgment below.

This case presents two exceptionally timely and important questions: (1) whether States may, consistent with the Constitution, enact campaign finance reforms that impose mandatory limits on the amount that candidates for state office may spend on their election campaigns; and (2) whether States will continue to have the ability to enact contribution limits, which have become a mainstay of state campaign finance reform efforts, to prevent corruption and the appearance of corruption in the electoral process.

The Amici States have a vital interest in the resolution of these issues because they will directly impact their ability, and the ability of all States, to enact critically needed campaign finance reforms. Since 1976, when this Court struck down campaign spending limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Amici States have seen an astronomical increase in campaign spending by political candidates that has fueled a generally held public perception that money buys power. The States have further found that the intense pressure to raise funds greatly reduces the time that elected officeholders have available to serve the public and that electoral competition is diminishing because running for office has become a financial impossibility for an ever-increasing number of Americans.

To combat these extremely serious problems, which threaten to undermine the integrity of the democratic process at all levels of government nationwide and are getting worse by the day, it is essential that the Amici States, and all States, have the ability, if they so choose, to

enact campaign finance reforms such as Vermont's that include both contribution limits and expenditure limits. As the "laboratories of democracy," the States' ability to experiment in this regard is crucial if viable solutions to this national crisis are ultimately to be found. Accordingly, the Amici States have a vital interest in ensuring that the constitutionality of Vermont's legislation is upheld and may serve as a model for similar campaign finance reform efforts in other States.

SUMMARY OF ARGUMENT

In 1997, in response to deep public concern that unlimited fundraising and campaign spending was undermining the integrity of Vermont's electoral system, the Vermont legislature adopted the 1997 Vermont Campaign Finance Reform Act ("Act 64" or "the Act"), codified at 17 V.S.A. §§ 2801 – 2883 (2005). The Act constitutes a comprehensive reform of the State's campaign finance laws and includes limits both on the amount that a single source, political committee, or political party may contribute to a candidate for state office, and on the amounts that such candidates may spend on their campaigns. 17 V.S.A. §§ 2805, 2805a.

Vermont found that comprehensive campaign finance reform was essential because the skyrocketing costs of campaigning for elective office, fueled by an "arms-race" mentality in which candidates felt compelled to raise ever-increasing amounts of money to avoid being outspent by their opponents, had reduced public confidence and involvement in the electoral process, increased the appearance that candidates and elected officials would not act in the best interests of Vermont citizens, caused candidates and elected officials to spend inordinate amounts of time fundraising, resulted in candidates and elected officials responding and giving access to large contributors over small contributors and non-contributors,

and rendered running for public office a financial impossibility for many Vermonters. 1997 Vt. Laws P.A. 64. Concluding that it had compelling state interests in addressing these concerns, Vermont adopted Act 64.

Although the present lawsuit focuses on Act 64 and the record of Vermont's specific experience, it is vitally important to recognize that the deep-seated problems that threaten the integrity of Vermont's electoral process, and led to the adoption of Act 64, are by no means unique to Vermont. On the contrary, they plague virtually every State in the country and are seriously eroding public confidence in representative government nationwide.

Although the States have tried myriad reforms, they have not, to date, succeeded in controlling effectively the rampant corruption, extraordinary fundraising pressure, or loss of equal opportunity for political participation caused by limitless campaign spending. Expenditure limits, however, hold particular promise as a means of addressing these concerns. While each State must assess for itself whether expenditure limits will serve its unique needs, it is essential that the States have the choice. Numerous States are actively pursuing reforms that include such limits and public support for such measures is extraordinarily high. Given the urgent need to restore public confidence in the integrity of our democratic process, the Amici States urge this Court to affirm the judgment of the Second Circuit upholding the constitutionality of expenditure limits and permit States nationwide to experiment with these critically-needed reforms.

Although expenditure limits are a key component of Act 64, the Act also imposes contributions limits. Unlike expenditure limits, which have been largely unused since *Buckley* due to uncertainty over their constitutionality, contribution limits have become well-established tools in the States' efforts to eliminate corruption and the appearance of corruption in the electoral process. Although

the petitioners would have this Court abandon its well-established precedents upholding the constitutionality of contribution limits, and thereby threaten both existing limits in other States and the ability of all States to adopt such limits in the future, nothing warrants such drastic revision of the law. On the contrary, this Court should affirm the constitutionality of contribution limits in general, and Vermont's in particular, recognizing that it is the legislature, not the judiciary, that is best suited to determine in each case the precise limit that will best promote the States' interest in preventing corruption and the appearance of corruption in the electoral process.

ARGUMENT

I. THE ABILITY TO EXPERIMENT WITH EXPENDITURE LIMITS IS VITALLY IMPORTANT TO THE STATES, ALL OF WHICH FACE THE SAME THREATS TO THE INTEGRITY OF THE DEMOCRATIC PROCESS AS VERMONT.

In adopting Act 64's expenditure limits,[1] Vermont sought to address multiple, serious problems threatening the integrity of its electoral system, including: (1) the corruption and appearance of corruption that result when candidates become beholden to financial constituencies capable of generating large combined contributions to the candidates' campaigns; (2) the inability of candidates and officeholders to interact with voters and perform their

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[1] Act 64 limits expenditures by candidates for the following offices to the following amounts: governor - $300,000; lieutenant governor - $100,000; other state-wide office - $45,000; state senator - $4,000 to $16,000 (depending on the number of senators in the district); county office - $4,000; state representative, multiple-seat district - $3,000; and state representative, single-seat district - $2,000. 17 V.S.A. § 2805a. In 2005, the legislature amended the law to provide for increases in these limits according to the Consumer Price Index in each election cycle beginning in July, 2005.

official duties because of the inordinate amounts of time that they are required to spend fundraising; and (3) the loss of equal participation in the electoral process that results when citizens are financially unable to run for office. Although the evidence in this case focuses on Vermont's experience, seemingly daily accounts across the country of government scandals, corruption probes, influence-peddling by elected officials, special interest lobbyists wining and dining with candidates at one multi-million dollar fundraiser after another, entrenched incumbents running unopposed, and abysmal voter turnouts have made all too clear that Vermont's experience is indicative of a national crisis.

A. Since *Buckley*, There Has Been A Dramatic Escalation In The Cost Of Campaigning For Elective Office.

In the thirty years since *Buckley*, the costs of running for elective office, whether at the national, state, or local level, have increased astronomically. According to statistics compiled by the Center for Responsive Politics, the money spent by presidential and congressional candidates in the 2004 federal elections totaled a record-breaking $4 billion. Center for Responsive Politics, *Campaign Finance Reform* (Jan. 19, 2005)(available at www.opensecrets.org/ news/ campaignfinance/index.asp). This astounding figure represents a 30% increase over the $3 billion spent only four years earlier in the 2000 federal elections. *Id.* Whereas the average winning Senate campaign cost $610,000 in 1976, Wertheimer and Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994), by 2004 the average cost had risen to $7.84 million, with the top spender pouring more than $28 million into his campaign. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/ topspend.asp?cycle=2004); Mark C. Alexander, *Let Them*

Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials, Loyola University Chicago Law Journal, Vol. 37, note 9 (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid =816244). In the 2004 presidential campaign, President George W. Bush spent $345 million, up from $185 million four years earlier, making the 2004 presidential election the most expensive campaign in history. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/topraces.asp).

In state elections, the increases are equally alarming. For example, in the 54 gubernatorial elections held between 1977 and 1980, the total expenditures, expressed in 2004 dollars, were $507.8 million. Thad Beyle, *Governors: Elections, Campaign Costs and Powers*, pp. 197-198, The Book of the States (2005 ed.). Just over two cades later, in the 53 gubernatorial elections held between 2000 and 2003, the total expenditures in 2004 dollars had skyrocketed to $1,148 million -- an increase of 126%. *Id.* In the only two gubernatorial races in 2005 -- in Virginia and New Jersey – the candidates smashed all previous spending records for a governor's race in both states by more than 33 and 100 percent respectively. Bob Lewis, *Kilgore's $22 Million Busts Fundraising Record*, Associated Press (Oct. 31, 2005) (available at www.vpap.org/vpa/AP11012005.htm); David Chen and David Kocieniewski, *As Multimillionaires Duel, Corzine Outspends Forrester*, The New York Times (Nov. 5, 2005)(available at www.nytimes.com/2005/11/05/nyregion/metrocampaigns/05finance.html). In New Jersey, the record expenditures were attributed in part to the fact that both candidates were multimillionaires who had eschewed the State's public financing system and poured millions of dollars of their personal funds into their campaigns. *Id.*

Such limitless expenditures are fueled by the fact that the candidate who spends the most money generally wins. For example, in the 2004 congressional primaries, 91% of the candidates who raised the most money won their races. U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 8 (Oct. 2004)(available at www.uspirg.org/reports/WealthPrimary2004.pdf). Of the 11,400 candidates who ran in general-election contests for state legislative seats in 2003-2004, 85% of the winning candidates raised the most money in their races. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 3 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). And in the 2004 gubernatorial races, 66% of the biggest spenders won. *Id.* at 6. Given the high correlation between outspending one's opponent and winning, there is no reason to believe that the pressure to spend ever-increasing amounts to attain elected office will lessen in the absence of significant reforms to the current system of campaign financing.

B. All States Have A Compelling Interest In Deterring The Corruption And The Appearance Of Corruption In Elective Politics And Government That Is Caused By Unlimited Campaign Expenditures.

Based on almost six months of hearings and testimony from 145 witnesses, the Vermont legislature found that "[l]arge contributions and large expenditures by persons or committees . . . reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." 1997 Vt. Laws Pub. Act 64 (H. 28)(finding (a)(9)). This loss of public confidence in the electoral system results when candidates and elected officials, faced with a limited number of campaign contributors and a constant fear of being outspent, become

dependant on special interest groups that can generate large combined contributions. Concerned that they cannot oppose these groups without being cut off from needed funds, the candidates and elected officials set their agendas and make decisions based on the desires of the special interests to whom they are beholden, rather than on the needs of the citizens whom they represent. The result is that "citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power." *Landell v. Sorrell*, 382 F.3d 91, 119 (2d. Cir. 2004). Given evidence that "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns," *id.* at 119 (emphasis omitted), the Second Circuit appropriately concluded that "Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates." *Id.* at 118.

The same is true across all States and all political affiliations. States are finding, as Vermont has, that candidates and elected officials have become dependant on special interest groups that can generate large combined contributions and that official decision-making with regard to everything from state contracts and investments to state employee hiring and promotions is all too often influenced by campaign contributions.

In Connecticut, such corruption was rampant in the administration of former Governor John Rowland, resulting in Rowland's resignation as Governor on July 1, 2004 under threat of impeachment for illegally doling out millions of dollars in state contracts to companies and individuals who had, among other favors, contributed significantly to his election campaigns. One such

contributor, the Tomasso construction group, marshaled over $435,000 in contributions from family members, associated companies and subcontractors to Governor Rowland's two re-election campaigns and state and national political party accounts. Common Cause, *The Rowland Corruption Trail Begins On The Campaign Trail*, p. 1, Jan. 20, 2004 (available at http://ccag.net/Democracy/final%20cc%20tomasso%20report.pdf). Included in the Tomassos' contributions were significant donations by TBI Construction, which began contributing heavily to Rowland's re-election campaign in 1998. *Id.* at 4-5. In the following four years, the Rowland administration awarded TBI three major no-bid state contracts worth more than $125 million, appointed the company's president to a juvenile justice state advisory panel, despite a seeming lack of qualifications or experience, and seated the company's executives with the Governor and his wife at social functions. *Id.* at 5. In short, the company's contributions bought access, influence and favoritism.[2]

Similar "pay-to-play" corruption infected the office of former Connecticut State Treasurer Paul Silvester, who is currently serving a federal prison term for misusing his authority over Connecticut's $20 billion pension fund to generate millions of dollars in kickbacks and campaign contributions. Edmund Mahoney, *Silvester to Spend 28 More Months In Jail*, Hartford Courant, p. A1, Nov. 21, 2003; Associated Press, *Rowland Campaign Benefited*

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[2] The same was true of numerous other major Rowland contributors. For example, after energy giant Enron and its associates began contributing regularly to Governor Rowland's election campaigns, three Enron executives secured a private meeting with the governor and ultimately obtained the equivalent of a $220 million unsecured loan from the State. Alison Leigh Cowan, *The Garbage and the Governor: Enron in Impeachment Inquiry*, New York Times, section A, p. 1 (March 16, 2004); *see also* Connecticut Common Cause, *The Gift That Keeps Giving: Campaign Contributors Benefited From Tax Breaks* (April 12, 2005)(available at www.commoncause.org/atf/cf/{FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/KeyAir-Sousa%201.pdf).

From Treasurer Contacts, Jan. 18, 2000. Among other tactics, Mr. Silvester demanded that firms seeking lucrative state contracts to manage state pension investments contribute hundreds of thousands of dollars to his own campaign and that of Governor Rowland. *Id.*; Edmund Mahoney, *State Treasurer Scandal Finally Comes To Trial*, Hartford Courant, p. A1, June 13, 2003.

A similar ongoing scandal in Ohio, dubbed "Coingate," centers around Thomas Noe, a rare coin dealer and political fundraiser who has contributed more than $200,000 over the past fifteen years to prominent state and federal elected officials. Using his contributions to gain influence, Mr. Noe won highly coveted gubernatorial appointments to the Ohio Board of Regents and the Ohio Turnpike Commission, before garnering an unprecedented $50 million investment of state money in his rare coin fund by the Ohio Bureau of Workers' Compensation. James Drew and Steve Eder, *Voinovich Appointment Started Noe's Rise*, Toledo Blade (Sept. 4, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=20050904/SRRAECOINS/309040001). Soon after receiving the investment, Mr. Noe began transferring large sums to his personal accounts and making thousands of dollars in political contributions to the governor, state auditor and other top elected officials. Steve Eder and James Drew, *Noe Transferred Coin Cash Before Giving To Politicians*, Toledo Blade (Oct. 9, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20051009/SRRARECOINS/310090001); James Drew and Steve Eder, *Petro: Noe Stole Millions*, Toledo Blade (July 22, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20050722/SRRARECOINS/50722004). State and federal investigations subsequently revealed that $13 million out of the $50 million investment in the coin fund was missing and unaccounted for, *id.*, and that Mr. Noe was laundering money, using 24 individual "donors," to whom he gave cash, as conduits to funnel over $45,000 into a presidential

campaign. Mike Wilkinson and James Drew, *Noe Indicted: GOP Backer Accused Of Laundering Cash*, Toledo Blade (Oct. 28, 2005) (available at www.toledoblade.com/apps/pbcs.dll/article?AID = /20051028/SRRARECOINS/31028 0002). Summing up the situation, an Ohio teacher railed that "[p]ay-to-play politics not only exists, it's out of control. . . .Wealthy people have special access to politicians that I don't have. I can't play because I can't pay." Jim Provance, *Vote Reform Helps Stall Ohio Spending Cap*, Toledo Blade (August 10, 2005).

The public has voiced similar outrage over official corruption in Tennessee, where a recent investigation revealed that two-thirds of the Tennessee Highway Patrol officers tapped for promotion under Governor Phil Bredesen contributed to his campaign or had family members or political patrons who did. Brad Schrade, *Troopers With 'Politics' Win Out On Promotions*, The Tennessean (Nov. 13, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20051113/NEWS0201/51 1130390). Among those with such connections, over half were promoted over troopers who scored better on impartial exams or rankings. *Id.* Campaign donors who were not troopers were rewarded in other ways, such as by being given photo identification cards that appeared identical to those held by Tennessee Highway Patrol officers. Trent Seibert and Brad Schrade, *Trooper-like Badges, IDs Go To Well-Connected*, The Tennessean (August 7, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20050807/NEWS0201/508070403). To the average citizen, the cards sent a clear message that there was a different set of rules for the well-connected, who could brandish the cards to obtain official favors and avoid being arrested. *Id.*

While such corruption and apparent corruption is horrifying in itself, what is particularly alarming is that it has become so common and has fueled a generally held

public perception that money buys power and that those with power do not represent those without money. In 1997, almost half of all Americans believed the influence of money in politics seriously undermined democratic ideals by leading elected officials to vote against their constituents' interests and support policies they did not personally believe were best for the country. Center for Responsive Politics, *A National Survey of the Public's Views on How Money Impacts our Political System*, conducted by the Princeton Survey Research Associates (June 1997)(available at www.opensecrets.org/ pubs/survey /top.htm).

More recent surveys suggest that such cynicism is growing. *See, e.g.*, The Study Commission on Public Funding of Campaigns in Maryland, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, Dec. 2002 (available at www.capc.umd.edu/ rpts/MDCamp FinSrvy.pdf)(among Maryland voters, 92% believe that campaign contributions influence the policies supported by state elected officials and 83% believe that contributors have greater access to elected officials than those who do not contribute); Zogby International, *Views of Connecticut Voters On Public Financing Legislation*, p. 4 (May, 2005) (available at www.commoncause.org/atf/cf {FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/zogby% 20poll.pdf) (62% of Connecticut voters believe that elected officials in their state are more concerned with the needs of those who pay for their campaigns than with the needs of those who do not); Pew Research Center poll (Feb. 2004) (available at www.publicagenda.org/issues/pcc_detail.cfm ?issue_type=campaign_finance&list=3)(59% of Americans are "very much" bothered by the amount of money that candidates spend on campaigns); Pew Research Center poll (August, 2003)(available at www.publicagenda.org/issues/ pcc_detail.cfm?issue_type = campaign_finance&list = 12) (59% of Americans believe that most officials do not care what they think); CBS News poll (Jan. 2001)(available at

www. public agenda. org/ issues/ pcc. cfm?issue_type= campaign_finance)(70% of Americans think that public officials make or change policy decisions as a direct result of money that they receive from major campaign contributors).

Because "the avoidance of the appearance of improper influence is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent," *Buckley*, 424 U.S. at 27 (internal quotation marks omitted), it is essential that States have the means to prevent such influence through reforms that curb the arms race mentality and diminish candidates' dependence on large contributions from special interests.

C. All States Have A Compelling Interest In Enabling Elected Officials To Spend Less Time Fundraising And More Time Serving The Public.

The Amici States also share Vermont's compelling interest in curbing the staggering costs of campaigning in order to permit officeholders to spend less time fundraising and more time interacting with voters and performing official duties.

The Second Circuit concluded that the evidence in Vermont was "clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." *Landell*, 382 F.3d at 122. In particular, the unrelenting need to raise funds compels officials to spend time fundraising and meeting with donors rather than attending to their official duties, *id.* at 122-123, and to respond and give access to contributors who make large contributions in preference to those who make small contributions or no contributions. *Id.* at 122 n. 16; 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(2)).

This time problem afflicts elected state and local officials nationwide. *See Rosenstiel v. Rodriquez*, 101 F.3d

1544,1553 (8th Cir.1996), *cert. denied*, 520 U.S. 1229 (1997)(recognizing Minnesota's compelling interest in reducing the time candidates spend fundraising, thereby increasing the time available for discussion of the issues); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993)(recognizing Rhode Island's valid interest in freeing candidates from the pressures of fundraising); Alaska Stat. § 15.30.160(1); Ariz. Rev. Stat. § 16-940(B)(8)("[t]he people of Arizona find that our current election-financing system . . . [r]equires that elected officials spend too much of their time raising funds rather than representing the public").

In Connecticut, complaints about the massive amounts of time that must be devoted to fundraising have been a common refrain among legislators pushing for campaign finance reform throughout the past decade.[3] In 1997, Representative Bysiewicz (now Connecticut's Secretary of State) explained that not only were the costs of running for state office spiraling out of control, but:

> [w]e also have the problem of . . . candidates spending too much time raising money. Conventional wisdom says that it costs about $3 million to run for governor. What does that mean? That means $29,000 a week for two years or $4,200 a day for two years. And that means that what you end up [with] is candidates who have to spend all their time raising money and they don't have any time to raise issues. And for those candidates who are incumbents they will be

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[3] In December, 2005, Connecticut enacted a campaign finance reform law that provides for public financing and is a vital step towards correcting the problems plaguing Connecticut's electoral process. 2005 Conn. Pub. Acts No. 05-5 (October 25, 2005 Special Session). As noted below in section E, however, voluntary public financing systems have not solved the time problem.

> spending lots of time raising money and have less time to do the people's business.

40 Conn. H. R. Proc., pt. 8, 1997 Sess. 2707 (May 14, 1997).

Unfortunately, the situation is not improving. In pressing for reform, former Connecticut gubernatorial candidate William Curry lamented that "every hour that we spend calling big contributors that we don't spend learning about the real problems in the real lives that people face every day is an hour lost to democracy as far as I'm concerned." Conn. Joint Committee Hearing, Government Administration and Elections Committee, p. 538 (March 11, 2002)(remarks of William Curry). Another Connecticut legislator has summed up the problems as follows:

> [E]veryone can acknowledge that the influence and the time taken in the preoccupation with fund raising is time taken away from what should be our preoccupation with issues, and debate, talking to our constituents, debating with each other the issues, and indeed campaigning hard. Yet, in race after race, campaign after campaign, we have seen more and more pressure put on each and every one of us to *raise funds* and then *raise funds* and then *raise funds* and then *raise funds*.

43 Conn. S. Proc., pt. 4, 2000 Sess. 1021-1022 (April 12, 2000)(remarks of Senator Sullivan)(emphasis added). The result of such relentless pressure is that, across the country, "all too often [legislators] become fund-raisers first, and legislators second." 138 Cong. Rec. § 115 (daily ed. Jan. 6,1987)(statement of Sen. Byrd).

D. The States Have A Compelling Interest In Ensuring That All Citizens Have An Equal Opportunity To Participate In The Political Process.

A third consequence of the intense pressure on candidates to outspend their opponents, which the Second Circuit did not reach in Vermont's case, but which poses equally as great a threat to the integrity of the electoral process as corruption and time consumption, is the loss of equal opportunity for citizens to participate in the electoral process.

Democracy is premised on the belief that all citizens should have an equal voice in government. As a result, this Court has consistently struck down barriers to equal participation of voters and candidates alike. *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)(striking down poll taxes); *Bullock v. Carter*, 405 U.S. 134 (1972)(striking down candidate filing fees); *Lubin v. Panish*, 415 U.S. 709 (1974)(striking down candidate filing fee). Yet, despite this ideal, unlimited campaign spending has made running for office a financial impossibility for most individuals, not just in Vermont, but across the country. *See* 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(1)); Alaska Stat. § 15.30.160(3)("[t]he people of the State of Alaska hereby find and declare as follows: . . . entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the people of Alaska"); Ariz. Rev. Stat. § 16-940(B)(7)("[t]he people of Arizona find that our current election-financing system: . . . [d]rives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special interest funding"); Colo. Rev. Stat. § 1-45-102 ("[t]he people of the state of Colorado hereby find and declare that . . . the rising costs of campaigning for political office prevent qualified citizens

from running for political office"); Neb. Rev. Stat. § 32-1602(1)("[t]he Legislature [of Nebraska] finds that the cost of running for statewide office and legislative seats has risen greatly and that many qualified candidates are excluded from the democratic system as a result of such rising cost"); R.I. Gen. Laws § 17-25-18 ("the general assembly [of Rhode Island] finds that the need to raise ever larger sums of money to effectively compete for general office threatens the essence of our democratic system by excluding many well qualified candidates").

In particular, the need for ever-increasing campaign funding means that millionaire candidates are increasingly common. In the 108th Congress, for example, 42% of senators and 25% of representatives were millionaires, compared with less than 1% of the citizenry at large. U.S. PIRG Education Fund, *Look Who's Not Coming To Washington*, p. 6 (Jan. 2005)(available at http://uspirg.org/reports/lookwhos2005.pdf). In the 38 gubernatorial races in 2002, 21 candidates contributed $1 million or more to their own campaigns. The Institute on Money in State Politics, *State Elections Overview 2002*, p. 6 (Nov. 2004)(available at www.followthemoney.org/press/Reports/200411181.pdf). It has been found that "millionaire candidates distort the electoral process and make it considerably more difficult for ordinary citizens to run for office because the level of funds needed to compete with millionaires is beyond the reach of most candidates." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/democracy/democracy.asp?id2=5977&id3=CFR&).

Would-be candidates lack the funds not only to compete with millionaires, but also to compete with incumbents. Incumbent candidates generally have far greater access to campaign funds than their challengers and have enormous financial war chests that discourage new faces from even attempting to run for office. The result is

that, in many cases, incumbents face no competition at all. *See* U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 4 (Oct. 2004)(finding that 65% of the 2004 congressional primary races were uncontested).

Unlimited campaign spending, which permits millionaire and incumbent candidates to spend as much as they can raise, reduces the number of people willing to run and, as a result, limits voters' choices. As one scholar has observed, the result is that "unlimited spending, rather than protecting speech, may actually reduce both the amount and the diversity of electoral speech that voters hear." Richard Briffault, *Special Series on Election Law: The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 Fordham Urb. L. J. 399, 434 (May 2005). Accordingly, States have a compelling interest in limiting campaign expenditures in order to preserve the right of citizens to participate equally in the electoral process that is crucial to democratic government.

E. Expenditure Limits Have The Potential To Solve The Deep-Seated Problems Caused By Unlimited Campaign Spending.

Although States have experimented with a wide variety of campaign finance reforms, the reforms to date have not solved the problems of corruption, time loss, and diminished opportunity to participate in the electoral process that result from the ever-increasing costs of campaigning.

In particular, contribution limits alone have not been sufficient. As the Second Circuit observed in Vermont's case, contribution limits have not solved the corruption problem because "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them." *Landell*, 382 F.3d at 119.

Public financing systems, in which candidates receive public funding if they agree to abide by spending caps, are likewise unable to remedy the problems caused by runaway campaign spending because such systems, to date, have allowed candidates to opt out. *See* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials*, Loyola University Chicago Law Journal, Vol. 37, § III.B (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid=816244) Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1317-1318 (May, 1994). Under such systems, candidates with extensive personal wealth or a particular ability to raise funds beyond those that would be provided through public financing tend to forego public funds and seek to outspend their opponents because outspending one's opponent is typically the key to winning. This was the case in the 2005 gubernatorial race in New Jersey between Senator Corzine and Mr. Forrester. Both candidates were millionaires, who opted out of available state public financing in order to be free to spend unlimited amounts of money on their campaigns. Similarly, both major party presidential candidates in the 2004 primary opted to forego available public financing. As one scholar has accurately observed, "[t]he inability to force compliance is the gaping hole in the efficacy of public financing." *Id.*

Whereas contributions limits and public financing have failed to end the corruption, endless fundraising, and lack of equal participation spawned by ever-increasing campaign costs, expenditure limits have the potential to address all of these problems. In particular, expenditure limits eliminate the possibility of being vastly outspent that leads to the "arms race" mentality among candidates and elected officials. *Landell*, 382 F.3d at 127. According to

Vermont legislators and officials who testified in the present case, limits that prevented them from being outspent would increase their willingness to take positions that their contributors opposed. *Id.* at 127. In other words, if they are not going to be outspent, legislators are less likely to become beholden to the special interests that are so vital to their ability to raise limitless funds.

Similarly, capping expenditures reduces the time that candidates must spend fundraising, thereby freeing them to perform the work that they were elected to do. It also frees them, if they so choose, to engage in core First Amendment activities, such as delivering speeches and debating issues. As one study has pointed out, when spending is unlimited, "[a]ll too often, frontrunners will simply refuse to debate [their] opponent[s], preferring instead to raise campaign funds and buy commercials." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/ democracy/democracy.asp?id2=5977&id3= CFR&). With spending limits in place, "time freed from fund-raising creates new opportunities for speech – among representatives, for example, or by a candidate to ordinary citizens." Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1324 (May, 1994). Thus, spending limits not only free candidates from the time pressures of fundraising, but also provide further opportunity for political speech.

Expenditure limitations also reduce the threat to equal participation posed by millionaires and incumbents with access to vastly greater resources than the average citizen. By placing a ceiling on the amount that candidates can spend, expenditure limits make running for office less financially daunting for the average person and thereby promote electoral participation by encouraging more citizens to run. Voters benefit not only because they have

greater choice among candidates, but also because elected officials are forced to be more accountable to their needs, knowing that voters have a choice. The result is a more representative government.

Given the tremendous potential for expenditure limitations to control the influence of money on the electoral process, state and municipal legislators across the country are actively considering reform measures that include such limitations. *See, e.g.*, Massachusetts H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm) (proposing limits on campaign expenditures for all general, special, and primary elections for state office); North Carolina H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005) (available at http://www.ncga.state.nc.us/ Sessions/2005/ Bills/ House/HTML/H1533v0.html)(proposing mandatory expenditure limits on campaigns for the council of state and general assembly); Oregon H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess. (Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro. html) (proposing limits on a candidate's expenditure of his or her own funds in an election campaign).

Moreover, public support for campaign expenditure limits is extraordinarily high. A recent poll shows that a remarkable 87% of voters nationwide would support laws limiting campaign expenditures. Lake Research Partners, Public Opinion on Election Campaign Spending, p. 8 (Dec. 2005)(available at http://www.demos.org/pubs/Voter Survey_010406.pdf). Significantly, such support is extremely strong and consistent across all regions of the country (ranging from 84% support in the South to 91% in the Northeast), all political parties (84% support among Republicans, 89% support among Independents, and 90% support among Democrats), and all major demographic groups (84% support among men, 90% support among women, 88% support among those under age fifty, 86%

support among those over age fifty, 87% support among non-college graduates, 88% support among college graduates, 89% support among whites, 83% support among non-whites, 87% support among those with household incomes under $50,000, and 89% support among with household incomes over $50,000). *Id.* at pp. 9-11.

When asked about the effect that expenditure limits would have on the electoral process, 76% of those polled believed that the fairness of elections would improve, 70% stated that the potential for corruption and undue influence by special interests would decrease, 84% stated that elected officials would spend more time on their official duties and candidates would spend more time talking with voters, and 82% said that citizens would be more able to run for office. *Id.* at 12-15. Overall, 82% of voters felt that if laws incorporating expenditure limits were adopted, they would have more faith in the integrity of the election process. *Id.* at 15.

In sum, public interest in, and support for, expenditure limits is enormous nationwide. Given the great potential for such limitations to be invaluable tools in controlling the influence of money in electoral campaigns, the broad interest of States across the country in experimenting with such limits, and, as the respondents have shown, the lack of constitutional barriers, it is imperative that this Court uphold the constitutionality of Act 64 and open the door for similar legislation nationwide.

II. CONTRIBUTION LIMITS PLAY A KEY ROLE IN THE STATES' EFFORTS TO PROTECT THEIR ELECTORAL PROCESSES FROM CORRUPTION AND THE APPEARANCE OF CORRUPTION.

In fashioning Act 64, the Vermont legislature did not rely on expenditure limits alone. Instead, it concluded that limits on contributions to candidates from individuals, PACs, political parties, and any other single source were an

essential component of its comprehensive effort to address the myriad problems caused by unlimited campaign spending. 17 V.S.A. § 2805(a). The limits that Vermont adopted, which apply per election cycle, range from $200 on contributions to candidates for state representative or local office, to $400 on contributions to candidates for statewide office. *Id.* Citing this Court's well-established precedents, the Second Circuit appropriately upheld these limits, concluding that Vermont's interest in eliminating actual and apparent corruption was sufficiently important to support the limits and they were not so low as to prevent effective campaigning. *Landell*, 382 F.3d at 137-139.

The petitioners seek to reverse this ruling, arguing, among other claims, that Vermont failed to prove the existence of sufficient actual corruption or to demonstrate that its limits were no lower than necessary to address that corruption. Such arguments not only fly in the face of this Court's well-settled precedents governing contribution limits, but also, if adopted, would drastically curtail the States' ability to enact such limits and threaten existing limits with endless legal challenges. Given the critical importance of contribution limits to the States' efforts to prevent corruption and the appearance of corruption in the electoral process, such a result would be an enormous step backwards, effectively opening the door to even more corruption than currently exists.

A. Contribution Limits Are Valuable Tools In The States' Efforts To Battle Corruption And The Appearance Of Corruption.

Since *Buckley*, this Court has repeatedly and consistently upheld the constitutionality of contribution limits, recognizing that such limits involve "little direct restraint" on political communication because they permit "the symbolic expression of support evidenced by a contribution," but leave the contributor free to discuss

candidates and issues. *Buckley*, 424 U.S. at 20-21; *Nixon v. Shrink Missouri*, 528 U.S. 377, 386-387 (2000); *McConnell v. Federal Election Commission*, 540 U.S. 93, 135 (2003). Because such limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *Shrink Missouri*, 528 U.S. at 386, they need only be "closely drawn to match a sufficiently important interest." *Id.* at 387-388 (internal quotation marks omitted).

In so holding, this Court has recognized that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell*, 540 U.S. at 143. Significantly, and contrary to the petitioners' claim, this Court has "not limited that interest to the elimination of cash-for-votes exchanges" or "quid-pro-quo arrangements," *id.*, but rather has clearly extended it to "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *Id.* at 150, quoting *Colorado II*, 533 U.S. at 441.

This Court has also rejected the petitioners' contention that to justify contribution limits based on its interest in preventing corruption and the appearance of corruption, a government must produce significant evidence of actual corruption. Instead, this Court has ruled that the level of proof required to sustain legislative judgments will vary with the "novelty and plausibility of the justification raised," *Shrink Missouri*, 528 U.S. at 391, and has recognized that it is "neither novel nor implausible" that large contributions could corrupt or raise suspicions of corruption. *Id.*; *McConnell*, 540 U.S at 144.

Finally, this Court has made clear that a contribution limit is not unconstitutional merely because a higher limit might work equally well. *Buckley*, 424 U.S. at 30. As long as a contribution limit permits a candidate to "amas[s] the resources necessary for effective advocacy," *id.* at 21; *Shrink Missouri*, 528 U.S. at 397, "a court has no

scalpel to probe whether . . . a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30.

Based on these rulings, contribution limits have become a mainstay of state campaign finance reform efforts. Although such limits have proved incapable in themselves of solving the multiple, deep-seated problems discussed in Section I, *supra*, they nonetheless serve a vital role in the States' efforts to protect the integrity of the electoral process. In particular, States have found that contribution limits further their compelling interest in preventing the corruption and appearance of corruption that is inherent in a system of large contributions by inhibiting the ability of wealthy interests to exert improper influence over legislative and executive policies. In addition, by requiring candidates to raise smaller sums from a larger group of contributors, contribution limits force candidates to seek broader popular support than they would if contributions were unlimited, and prevent them from simply selling themselves to the highest, most potentially corrupting bidder. Indeed, the benefits of contributions limits are so well-accepted that 45 States currently impose them in one form or another. National Conference of State Legislatures, *Contribution Limits* (2005)(available at www.ncsl.org/ programs/legman/about/ContribLimits.htm).[4]

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[4] *See, e.g.*, Alaska Stat. § 15.13.070; Ariz. Rev. Stat. Ann. § 16-905; Ark. Code Ann. § 7-6-203; Cal. Gov. Code § 85301; Colo. Rev. Stat. § 1-45-103.7; Conn. Gen. Stat. § 9-333m; 15 Del. Code § 8010; Fla. Stat. § 106.08; Ga. Code § 21-5-41; Haw. Rev. Stat. § 11-204; Idaho Code § 67-6610A; Kan. Stat. Ann. § 25-4153; Ky. Rev. Stat. § 121.150; La. Rev. Stat. Ann. § 18:1505.2; Md. Ann. Code art. EL, § 13-226; Mass. Ann. Laws, ch. 55, § 7A; Me. Rev. Stat. Ann. tit. 21-A § 1015; Mich. Comp. Laws § 169.252; Minn. Stat. § 10A.27; Mo. Ann. Stat. § 130.032; Mont. Code Ann. § 13-37-216; Nev. Const. art. 2, § 10; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. § 19:44A-11.3; NY Elec. Law § 14-114; N.C. Gen. Stat. § 163-278.13; Ohio Rev. Code § 3517.102; Okla. Stat., tit. 74, Chap. 62, Appx., 257:10-1-2; R.I. Gen. Laws § 17-25-10.1; S.C. Code Ann. § 8-13-1314; S.D. Codified Laws § 12-25-1.1; Tenn. Code

B. The Evidentiary Requirements Advocated By The Petitioners, If Adopted By The Court, Would Render It Virtually Impossible For States To Enact Contribution Limits And Cause Existing Limits To Become Mired In Legal Challenges.

In asking this Court to require States to produce evidence of actual corruption that is directly correlated with contributions just above the States' established limits, despite this Court's previous, express rejection of such a requirement, *Buckley*, 424 U.S. at 30, *Shrink Missouri*, 528 U.S at 391-392, 397, the petitioners seek to impose an impossible burden on the States that would threaten their continued ability to adopt contribution limits. As this Court recognized in *Buckley*, "the scope of [actual corruption] can never be reliably ascertained." *Buckley*, 424 U.S. at 27. Not only is it inherently difficult to prove the existence of corruption or to quantify its degree, but any requirement that the States meet the test advocated by the petitioners "would inevitably lead to endless court battles over the sufficiency of the 'evidence' marshaled by the State." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

Such a stringent evidentiary requirement would also force "a State's political system [to] sustain some level of damage before the legislature could take corrective action." *Munro*, 479 U.S. at 196. This approach would be senseless, given the widespread acknowledgment of the actual and perceived corruption associated with large contributions. Instead, as this Court held in *Munro*, a State should be permitted to respond to potential electoral deficiencies "with foresight rather than reactively," provided its

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Ann. § 2-10-302; Tex. Elec. Code § 253.155; Vt. Stat. Ann. tit. 17 § 2805; Wash. Rev. Code § 42.17.640; W. Va. Code § 3-8-12; Wis. Stat. § 11.26; Wyo. Stat. § 22-25-102.

response is reasonable and does not significantly impinge on constitutionally protected rights. *Id.* at 195-196. As a general rule, the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 195, 210 (1982). Nothing in the present case warrants imposing a different standard on Vermont.

C. Vermont's Contribution Limits Are Entitled To Deference And Are Not Significantly Different Than Other States' Limits That Have Been Upheld By The Courts.

The petitioners' further argument that Vermont's limits are unconstitutional because they would arguably be equally effective at higher levels is likewise unfounded. This Court explicitly rejected this argument in *Buckley*, 424 U.S. at 30, pointing out that it was not the prerogative of the courts to fine-tune the determinations of the legislature. Such deference is entirely appropriate.

In determining the dollar amounts that will be most effective at preventing corruption and the appearance of corruption, while still permitting candidates to amass the resources necessary for effective advocacy, each State must consider its own unique circumstances and needs. In States in which electoral districts cover small geographic areas or have few constituents, it may be possible for candidates to communicate with voters through relatively inexpensive means, such as by going door-to-door and distributing leaflets. In States where electoral districts are larger, television advertising and other, more expensive methods of communication may be required.

The wide variation among States in the costs of campaigning is borne out by figures compiled by The Institute on Money in State Politics documenting the average amounts raised by state legislative candidates in

the 2004 general elections. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). Whereas the average raised by state house candidates in California was $403,456, it was only $539 in New Hampshire. *Id.* Similarly, the average raised in state senate campaigns ranged from a high of $555,196 in California to a low of $3,747 in North Dakota. *Id.*[5] Myriad other factors, such as the income level of the State's inhabitants and their pattern of past contributions, may also factor into a State's determination of the most appropriate limits. In each case, the state legislature is far better positioned than the judiciary to weigh these factors and determine what dollar limit will best serve the State's needs.

Significantly, Vermont's contribution limits are not notably different from other States' limits that the courts have upheld. In *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004), the Ninth Circuit upheld a Montana statute limiting contributions to candidates for governor and lieutenant governor to $400, contributions to all other candidates for statewide office to $200, and contributions to candidates for any other public office to $100. Although the court acknowledged that these limits were "some of the lowest in the country," *id.* at 1095, it nonetheless concluded that they did not prevent Montana candidates from running effective campaigns.

Similarly, in *Daggett v. Commission on Government Ethic and Elections*, 205 F.3d 445 (1st Cir.

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[5] Significantly, the costs of campaigning in Vermont are very low compared to those of other States. The average amount raised by state house candidates in Vermont ($2883) was less than in all other States except New Hampshire and Wyoming, and the average amount raised by Vermont state senate candidates ($12,463) was lower than in all but three States, Montana, North Dakota and Wyoming. *Id.*

2000), the First Circuit upheld a Maine statute imposing per election limits of $500 on contributions to gubernatorial candidates and $250 on contributions to all other candidates. In *Minnesota Citizens Concerned v. Kelley*, 427 F.3d 1106 (8th Cir. 2005), the Eighth Circuit upheld Minnesota's $500 limit on contributions to legislative candidates and in *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256 (Mar. 20, 2000), the court upheld Florida's $500 limit on contributions to any state candidate.[6]

In short, Vermont's limits are not significantly different from those upheld in other States, including States such as Florida where the population is much greater than in Vermont[7] and the costs of campaigning are dramatically higher. *See* The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005)(noting that the average amount raised by Florida house candidates for the 2004 general election was $97,219, compared with $2,883 in Vermont). If this Court were to conclude, contrary to the Second Circuit's ruling, that Vermont's limits did not pass constitutional muster, the constitutionality of all of these other States' limits might be called into question. Because the petitioners have articulated no good reason to reach such a result, this Court should affirm the constitutionality of Vermont's limits and thereby ensure the continued ability of all States to utilize contribution limits in their on-going battle to protect the integrity of their electoral processes and restore the public's faith in democracy.

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[6] The contribution limits at issue in these cases – in Montana, Maine, Minnesota and Florida -- were per election, with the exception of Minnesota's limit, which was per election year. In non-election years, Minnesota's limit for contributions to legislative candidates drops to $100. Minn. Stat. § 10A.27.

[7] Florida's population exceeds 17 million, whereas Vermont's population is less than 700,000. U.S. Census Bureau, http://quickfacts.census.gov/qfd/index.htm.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

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v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF WILLIAM H. SORRELL, *et al.*

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of William Sorrell, *et al.*, Respondents/Cross Petitioners in these cases.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends increasingly coming to national attention. *Amici* do not necessarily support spending limits in any particular campaigns, but they believe that sovereign states should have the power to protect their elected judiciaries from the corrosive effects of uncontrolled spending by imposing generous limits on expenditures by candidates for the bench. *Amici* recognize that the instant case does not pertain directly to judicial campaigns, but a ruling that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), constitutes an absolute bar to mandatory spending limits will directly impair their interests in protecting the integrity, impartiality, and independence of the bench, both real and perceived. *Amici* therefore urge this Court not to accept that excessively expansive reading of *Buckley*, or, if that reading cannot be avoided, to revisit *Buckley*'s ruling in light of the arguments presented here.

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[1] We have been informed that the Attorney General of Vermont has filed a letter with the Clerk of this Court, consenting to the filing of all *amicus* briefs. Letters from counsel for all other parties, consenting specifically to the filing of this brief, have been filed with the Clerk of this Court by counsel for *Amici*. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] A complete list of the *Amici Curiae* is annexed as an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici acknowledge that several courts have read language in *Buckley* to outlaw all campaign expenditure ceilings. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 913-18 (6th Cir. 1998) (rejecting spending limits because interests advanced in their defense were rejected as constitutionally insufficient in *Buckley*). It is neither necessary nor appropriate, however, to read *Buckley* as an absolute ban on all mandatory limits on campaign spending. It is a mistake to read the language of any judicial opinion—including that of *Buckley*—as a theoretical pronouncement divorced from the fact pattern and statutory scheme that was actually before the Court.

Because the Federal Election Campaign Act ("FECA") at issue in *Buckley* imposed very low expenditure ceilings, and the *Buckley* Court evaluated only three state interests offered to justify those caps, this Court should not read *Buckley* to impose a *per se* ban on spending limits. Specifically, because FECA governs only federal candidates, *Buckley* did not present the issue whether expenditure caps applicable to judicial candidates might be justified by interests unique to the judiciary. This Court thus should not read *Buckley* to foreclose generous spending limits in campaigns for the bench. Point I.

If this Court concludes that *Buckley* categorically precludes all spending limits, then *Buckley* should be revisited. The decision in *Buckley* rests on the questionable premises that limits on spending invariably impose a severe burden on campaign speech and that contribution limits are adequate to combat real and perceived corruption. But above generous levels allowing for vigorous debate of the issues, the declining marginal utility of campaign spending means that each new dollar adds little new communicative value. Moreover, there is reason—including evidence from recent

judicial elections—to conclude that candidates are not eager to spend without limit but are instead trapped in a form of prisoner's dilemma that only generous spending limits can resolve. Without those limits, candidates must endlessly escalate the fundraising arms race, even if it means accepting contributions that taint their integrity and present opportunities for abuse. *Buckley* falls when these false premises are rejected. Point II(A)-(B).

Even if this Court does not reject *Buckley*'s tenuous assumptions, the opinion in these consolidated cases should be crafted with restraint. This Court should not permit its opinion to foreclose spending limits in judicial elections, which are not at issue in this case and the constitutionality of which has never been briefed to this Court. Whether such limits can be factually supported and legally justified is a question for another day. Point II(C).

ARGUMENT

I. *Buckley* Should Not Be Read To Ban Generous Spending Limits in Judicial Campaigns.

A judicial opinion is not a statute enacted to address broad and widely shared policy concerns. A court's opinion is a reasoned explanation for the resolution of a particular case or controversy. When explanatory language in an opinion appears to describe a rule far broader than necessary to resolve the particular case before the Court, the language is entitled to respect as the Court's considered *dictum*, but it is not controlling in different factual and legal settings. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) ("[B]road language" that is unnecessary to a decision "cannot be considered binding authority."); *Humphrey's Ex'r v. United States*, 295 U.S.

602, 627 (1935) ("[G]eneral expressions" in an opinion that "go beyond the case" may be respected "but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.") (internal quotations omitted).

Because the broad language of *Buckley* goes well beyond what was necessary to decide the challenge to expenditure limits in that case, the opinion should not be read as binding on the very different circumstances presented in the cases now before this Court or a case challenging spending caps in judicial elections. Given the very low spending limits imposed by FECA, and the limited arguments in their defense asserted by the government, the federal expenditure caps could not withstand First Amendment scrutiny. But the ruling in *Buckley* does not foreclose the constitutionality of more generous spending limits supported by stronger justifications.[3]

A. *Buckley* Addressed Only the Very Low Spending Limits Imposed by FECA.

This Court first drew a bright-line distinction between campaign contributions and expenditures when it considered the constitutionality of the FECA 30 years ago in *Buckley*. The *Buckley* Court upheld FECA's caps on contributions to candidates, concluding that limiting large contributions

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[3] There will be no bright-line test whereby to judge whether spending limits are sufficiently generous to withstand First Amendment scrutiny any more than there is such a test to judge whether contribution limits are too low. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). But as with contribution limits, courts will be able to parse the facts and context of particular expenditure ceilings and, without second-guessing the line-drawing of the legislature, recognize differences in kind between spending limits that afford ample opportunity for all candidates to engage in vigorous discussion of their positions and those that do not. *See Buckley*, 424 U.S. at 30; *see also Nixon*, 528 U.S. at 395.

would combat both the appearance and reality of corruption without materially burdening a contributor's First Amendment rights. 424 U.S. at 20-38. The Court equated expenditures with political speech, however, and found that "the Act's expenditure ceilings impose[d] direct and substantial restraints" on First Amendment rights. *Id.* at 19-20, 39. It then ruled that three proffered state interests—in diminishing "the danger of candidate dependence on large contributions," "equalizing the financial resources of candidates competing for federal office," and "reducing the allegedly skyrocketing costs of political campaigns,"—could not justify imposing those restraints. *Id.* at 55-57. The very low limits in FECA invited such an analysis.

FECA imposed tight limits on independent expenditures, self-funding by individual candidates, and on spending by candidates' campaign committees.[4] No person could spend more than $1,000 annually advocating the election or defeat of any one federal candidate, *id.* at 40; presidential and vice-presidential candidates could spend no more than $50,000 of their own money, *id.* at 51; and varying limits were set for spending by congressional and presidential candidate committees, *id.* at 51, 54, 55. The Court commented that the independent expenditure limitation "would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper." *Id.* at 40. In addition, the campaign spending ceilings would have "substantially limited the overall expenditures of the two major-party Presidential candidates in 1972." *Id.* at 55 n. 62. The low levels of the limits plainly, and rightly, fueled

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[4] FECA's limits on expenditures by political parties were challenged only as Fifth Amendment violations and were upheld in *Buckley*. 424 U.S. at 59 n. 67. This Court later held that limits on independent expenditures by political parties violated the First Amendment. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616-618 (1996).

the Court's conclusion that First Amendment rights were severely burdened by FECA.[5] As is explained in Point II, however, generous expenditure limits need not impose such onerous burdens and thus should not be precluded by the decision in *Buckley*.

B. *Buckley* Did Not Consider the Full Range of State Interests That Could Be Proffered To Justify Generous Expenditure Caps.

The *Buckley* Court considered, and rejected, three governmental interests offered in defense of FECA's low spending limits. Although that reasoning may well warrant reconsideration, this Court need not now revisit that aspect of the decision to uphold generous spending limits. Experience since *Buckley* demonstrates that there are additional compelling state interests that may justify such limits.

What *Buckley* inadvertently wrought by upholding contribution limits and invalidating expenditure ceilings is a campaign finance system with limited supply and unlimited demand for money.[6] Candidates fearful of being outspent must chase every potential donation, even if it means—and it does mean—being locked up in a room for long hours every

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[5] *Amici* have no quarrel with the narrow holding of *Buckley* striking down the expenditure limits actually before that Court as undue interferences with political speech. It is because *Amici* believe that the size and contextual justification for a given set of spending limits are relevant to the First Amendment analysis that *Amici* oppose a mechanical reading of *Buckley* as a *per se* bar on expenditure limits, no matter what the circumstances.

[6] The solution to this problem cannot be a return to the unregulated campaign finance system with its attendant corruption, real and perceived, which precipitated the enactment of FECA in the first place. Rather, this Court should recognize that the very interests that support contribution limits, and other interests not considered in *Buckley*, warrant limits on the demand for cash as well as the supply.

day dialing for dollars. Sitting officials running for re-election are diverted from governmental responsibilities, and all candidates must divert their attention from the broad array of voters who crave communication with aspiring officeholders to the narrow range of well-heeled donors who can pay for such access. Fundraising pressures inescapable in the absence of expenditure caps thus have a direct adverse impact on the functioning of government, as both courts below recognized. *Landell v. Sorrell*, 382 F.3d 91, 123 (2d Cir. 2004); *id.*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). Moreover, the reality and appearance of corruption that arise when candidate time is disproportionately devoted to courting monied interests, *see* Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* 61-80 (1999) (describing what happens when the "culture of money" dominates politics); Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 16-23, 27-35, 61-68, 89-109 (1995) (providing examples from former officeholders of how fundraising compromised legislative decisions); contribute to the "eroding of public confidence in the electoral process." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

Expenditure limits thus serve two compelling interests not considered as potential justifications in *Buckley*. First, the ceilings ensure that public officials running for office will need less time to raise campaign funds and have more time to fulfill their duties of office, improving the quality of democratic representation. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282-83 (1994). Second, during the time that is spent on campaigning, candidates can reach out to constituents without the means to become contributors as well as to those who will provide financial support, encouraging more robust dialogue, broadening the scope of the policy debate, and building confidence in the

political process. Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1619 (1999) ("Fund-raising becomes such a preoccupation that it drives out competing uses of time, like thinking about issues, developing positions, and conferring with constituents even if they do not have a great deal of money.").

Finally, *Buckley* considered the constitutionality of limits imposed in FECA, which applied only to spending in federal elections. Because federal judges are not elected, the Court was never asked to consider—and this Court has never considered—whether there might be compelling governmental interests not implicated in races for executive or legislative office that could justify spending limits in campaigns for the state bench. Because Vermont does not elect its judges, that question is not presented in this case either. The distinct function of the judiciary—both federal and state, whether appointed or elected—and the unquestionable importance of preserving real and perceived judicial integrity, impartiality, and independence, thus argue for a reading of *Buckley* that does not preclude the possibility of proving compelling interests that justify expenditure ceilings in judicial elections. *See* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 135 (1998) ("*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence.").

II. *Buckley* Should Be Reconsidered If It Imposes a Ban on Mandatory Spending Limits That Reaches Not Only Executive and Legislative Races But Also Campaigns for the Bench.

If this Court reads *Buckley* as adopting an absolute ban on mandatory expenditure limits, the Court should revisit the decision in light of the factual evidence and legal arguments supporting Vermont's spending ceilings. *Cf. Agostini v. Felton*, 521 U.S. 203, 235-38 (1997). Whatever the strength of the Court's reasoning under the facts stipulated in *Buckley*, the circumstances of this case are distinguishable on at least two important grounds. First, the lower courts in this case found that effective campaigns could be conducted under Vermont's spending limits. Second, nearly 30 years of experience under *Buckley* has revealed that contribution limits alone cannot adequately combat the decline in public confidence caused by real and apparent governmental corruption. In other words, the principal assumptions on which the opinion rests do not hold true for generous spending limits that allow for meaningful campaigns.

A generous campaign spending cap is distinguishable from an unreasonably low spending limit in ways that are constitutionally significant with respect to the burden on both the candidate's First Amendment interest and the compelling nature of the government's interest in combating corruption. Given the extremely low spending limits at issue in *Buckley*, the Court correctly concluded that "the expenditure limitations contained in [FECA] represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19. But the generalized premise that restrictions on campaign expenditures are the equivalent of a direct ban on political speech simply does not hold when one considers the decreasing marginal effectiveness of campaign spending at generous levels. Moreover, the Court's assumptions that

campaign expenditures above a generous ceiling are unrelated to corruption and represent wholly voluntary speech are undermined by recognizing that campaign spending is often a prisoner's dilemma in which candidates feel compelled to engage in a destructive and potentially corrupting fundraising arms race. In judicial elections, especially, there is reason to believe that record-breaking expenditures are less a reflection of candidates' preferred method of conducting campaigns than of their inability (caused by the unnecessarily broad reading of *Buckley*) effectively to coordinate their decisions about spending in the absence of legally binding limits.

A. The Link Between Money and Speech Weakens as Campaign Expenditures Rise Above a Generous Level.

In striking down campaign spending limits, the *Buckley* Court's analysis rested in part on the assumption that a campaign's expenditure of money and its political speech are so closely related that an effort to regulate campaign spending is the virtual equivalent of an effort to regulate the speech directly. The Court assumed that the relationship between spending and speech is always identical, no matter how much money is involved: "A restriction on the amount of money a person or group can spend on political communication during a campaign *necessarily* reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (emphasis added).

In fact, the relationship between money and speech in political campaigns is not constant. Candidates spend money in order to persuade the electorate to go to the polls and vote

for them on election day.[7] To achieve that goal, candidates in contested elections must advertise themselves to the voters. Advertising, however, is subject to the law of diminishing returns—"the more of it is done, the less effective each unit becomes." Ross D. Petty, *The Impact of Advertising Law on Business and Public Policy* 38 (1992) (discussing commercial advertising); *see also* Robert W. McAuliffe, *Advertising, Competition, and Public Policy* 26 (1987) ("Most research has shown that there are *diminishing* returns to [commercial] advertising.") (emphasis in original). Although other factors also influence the marginal effectiveness of each additional dollar a candidate spends—for example, the candidate's name recognition,[8] whether the candidate is an incumbent,[9] and the amount of money her opponent has spent[10]—over a threshold level, the marginal effectiveness of additional campaign expenditures declines. *See* King Banaian & William A. Luksetich, *Campaign Spending in Congressional Elections*, 29 ECON. INQUIRY 92, 93 (1991) (noting that "additional [campaign] expenditures are not likely to be as effective as previous expenditures") (citing Gary Jacobson & Samuel Kernell, *Strategy and Choice in Congressional Elections* (1982)); Kevin B. Grier,

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[7] To the extent that a candidate's speech is a manifestation of her autonomy and self-expression, a campaign spending limit does not affect this interest. A campaign spending cap leaves a candidate free to speak her mind.

[8] *See, e.g.*, Kevin B. Grier, *Campaign Spending and Senate Elections, 1978-84*, 63 PUB. CHOICE 201, 210-11 (1989) (candidate spending to buy name recognition has a relatively larger effect at low expenditure levels as compared with the spending of a candidate that is already well known).

[9] *See id.* at 209 ("[A]t lower spending levels, challenger spending is more effective than equal amounts of incumbent spending, while incumbent spending is productive longer than is challenger spending.").

[10] *See, e.g.*, Keith T. Poole et al., *The Revealed Preferences of Political Action Committees*, 77 AM. ECON. REV. 298, 298-99 (1987) ("At the margin, a dollar of spending is more 'productive' in a close race than in one that is not highly competitive.").

Campaign Spending and Senate Elections, 1978-84, 63 PUB. CHOICE 201, 216 (1989) (stating that, while the relative productivity of campaign spending by challengers and incumbents varies with respect to the level of expenditures, "both types of spending have diminishing returns"). Thus, contrary to the *Buckley* Court's unqualified equation of campaign expenditures with political speech, the qualitative nature of the First Amendment interest of the candidate and the electorate marginally diminishes with each additional expenditure over a generous ceiling for both incumbents and challengers.[11]

In arguing that a generous spending cap would have less impact on First Amendment rights than would a low expenditure ceiling, *Amici* do not suggest that the impact is *de minimis*. Campaign expenditures above a generous spending cap would enable candidates to issue more campaign advertisements, just as allowing contributors to give more than $2,000 to a candidate for federal office would enable a contributor to communicate more strongly the intensity of her support for a candidate. The point is instead that just as the First Amendment value of money contributed to candidates decreases over a threshold amount, *see Buckley*, 424 U.S. at 20, the First Amendment value of money spent by candidates decreases at the high end of a diminishing

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[11] It is sometimes argued that spending ceilings have a greater impact on challengers than incumbents, largely because challengers must spend more to overcome the incumbency advantage of high name recognition. *See, e.g.*, Gary Jacobson, *The Effects of Campaign Spending on Congressional Elections*, 72 AM. POL. SCI. REV. 469, 470 (1978). Although this claim is hotly contested in the political science literature, *see, e.g.*, Donald Green & Jonathan Krasno, *Rebuttal to Jacobson's "New Evidence for Old Arguments,"* 34 AM. J. OF POL. SCI. 363, 369-72 (1990) (arguing that other factors, such as challenger quality, determine spending patterns and votes received), the argument is not directly pertinent in this case, as the spending ceilings in Vermont are generous and are not likely to stifle challenger spending.

marginal impact curve. As that value declines, so should the burden imposed on a state seeking to justify spending limits.

B. Spiraling Expenditures May Reflect a Prisoner's Dilemma, Rather Than Fully Voluntary Spending in Need of Protection.

The *Buckley* Court's decision to invalidate FECA's campaign expenditure limits rested on two key premises. The Court assumed that: (1) candidates were each free to choose whether to raise and spend increasingly large sums on their election campaigns, and (2) the level of expenditures was unconnected to the threat of corruption. *See* 424 U.S. at 57 ("[C]andidates . . . must retain control over the quantity and range of debate on public issues in a political campaign."); *id.* at 55-56 (campaign spending limits do not address the threat of corruption stemming from candidate dependence on large contributions). When applied to elections with high levels of campaign spending, however, neither assumption is justified.

Candidates functioning in an unregulated campaign expenditure setting are trapped in a prisoner's dilemma. In the classic account of the prisoner's dilemma, two prisoners are arrested and held separately with no means of communication. If neither cooperates with the prosecutor, both will be convicted of a lesser offense and sentenced to two years' imprisonment; if only one agrees to testify against the other, that one will go free and the other prisoner will receive the maximum sentence of ten years' imprisonment; and if both cooperate, each will be prosecuted for the more serious crime but receive a six-year sentence instead of the maximum penalty. The prisoner's dilemma produces independent decisions by both prisoners to cooperate with the prosecutor, leaving them worse off than if they had been able to coordinate their decisions and agree to keep silent. Each prisoner would reason that he will be better off confessing

whether his codefendant stays silent (in which case he will receive no prison time instead of two years) or also confesses (in which case he will receive six years in prison instead of ten). *See* Douglas G. Baird et al., *Game Theory and the Law* 33-34 (1994); William Poundstone, *Prisoner's Dilemma* 116-25 (1992); Russell Hardin, *Collective Action* 2-3 (1982).

In the candidate's version of the prisoner's dilemma, each candidate must continue to raise and spend funds, not because he or she would freely choose to do so, but because the candidate fears that an opponent will do so, and thereby gain an advantage. "Each [politician] would prefer expenditures to be limited, but if they are not limited, each must struggle to raise and spend as much as possible." Ronald Dworkin, *Free Speech and the Dimensions of Democracy, in If* Buckley *Fell: A First Amendment Blueprint for Regulating Money in Politics* 63, 83 (E. Joshua Rosenkranz, ed. 1999). The resulting uncontrollable spiral intensifies candidates' dependence on contributions, rendering them vulnerable to the appearance and reality of corruption. The effect of the candidate's dilemma is that candidates and society are both worse off than if a generous spending ceiling had been in effect.

Except for the very wealthy, or in a system of full public funding of elections, all candidates must raise money to run for office. An unending round of fundraising is not always in the best interests of candidates. It is inordinately time-consuming, it is personally demeaning, it deflects them from the substantive business of governance and campaigning, and it exposes them to the reality and appearance of corruption. Moreover, because campaign spending follows the law of diminishing returns, at extremely high levels, it is unlikely to change the outcome of the election at all, especially when matched by an opponent. For these reasons, a rational candidate would seek to engage in no more fundraising than is necessary to make a persuasive case to the electorate.

Acting alone, however, no candidate can set a reasonable campaign spending (and therefore fundraising) limit. Campaign spending is not a static event. *See generally* Steven Ansolabehere & Shanto Iyengar, *Winning Through Advertising: It's All in the Context, in Campaigns and Elections American Style* 101, 108-11 (James A. Thurber & Candice J. Nelson eds., 1995) (noting that the impact of one candidate's advertising is contingent on the opponent's advertising; political advertisers are interdependent rather than autonomous actors). Although the law of diminishing returns applies to campaign expenditures, each candidate knows that winners usually outspend losers. *See, e.g.*, Poole, *supra* note 9, at 298; Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1175 (1994).

Accordingly, to set a reasonable budget, each candidate needs to know how much money his opponent will spend on the race. In an unregulated campaign expenditure world, however, a candidate will never know the outer range of his opponent's budget. A rational candidate therefore will engage in limitless fundraising and spending, reasoning that she is better off doing so no matter what her opponents does: she avoids the danger that she will be outspent and suffer because outspending correlates with winning, and given this correlation she may gain advantage by outspending her opponent. The result of this candidate's dilemma is a fundraising spiral in which, after a threshold level, each side engages in fundraising primarily out of fear that the other side will gain an advantage. *See* Neuborne, *Is Money Different?*, 77 TEX. L. REV. at 1617.

Moreover, as campaign spending spirals to higher and higher levels, candidates become more vulnerable to corruption. Because *Buckley* considered candidate

dependence on "large contributions" as the sole source of the actuality and appearance of political corruption, 424 U.S. at 55, the Court failed to consider that spiraling campaign costs are also corrupting because they increase a candidate's dependence on contributions *generally*. In the post-*Buckley* world, candidates are desperate to maximize expenditures, but limited in the amount of contributions they can raise from any one donor.[12] Hence, candidates must sell themselves to greater numbers of donors for smaller amounts of money. In such an atmosphere of intense need, both candidates and contributors are intensely vulnerable to an inappropriate temptation to trade badly needed cash for badly needed political favors. In contrast, under a spending cap, contributors become more fungible. If one contributor expects something in return for his contribution, the candidate can move to another who will not make such demands, without significant risk of strategic loss.

The involuntary and mutually destructive nature of the candidate's dilemma is well documented by the 2004 Supreme Court election in Illinois. The election set a national fundraising record for a single state Supreme Court seat—with the two candidates raising more than $9.3 million. Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—and How to Keep Our Courts Fair and Impartial* 14, 18 (Justice at Stake 2005). But even the victorious candidate expressed dismay at a campaign finance system that produced an endless money chase. Calling the expenditures "obscene," winner Lloyd Karmeier asked: "What does it gain people? How can people

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[12] Candidates are desperate to maximize expenditures even in states without contribution limits, as the recent Supreme Court elections in Illinois (described *infra*) demonstrate. There, the potential for corruption created by the endless demand is exacerbated by the opportunities for corruption presented by large contributions.

have faith in the system?" Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004. Plainly, the new justice did not believe that he or his opponent needed to spend many millions of dollars to deliver their messages to the electorate, but the system left neither of them with any other choice.[13]

Without that choice, Karmeier accepted large sums directly and indirectly from a party with a case pending before the Illinois Supreme Court while the election proceeded. Kevin McDermott, *Donations to Judge Figure in Court Cases*, St. Louis Post-Dispatch (Feb. 1, 2005). Once elected, he refused to recuse himself from the case. *See* Kevin McDermott, *Court Says Karmeier Can Hear Donor's Case*, St. Louis Post-Dispatch (Mar. 16, 2005). He then cast the deciding vote on a $456 million claim, overturning a lower court decision that was unfavorable to his donor. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005); G.M. Filisko, *Billion-Dollar Verdict Goes Bust: Illinois Supreme Court Reverses Record Verdict Against State Farm*, ABA Journal e-Report (Aug. 26, 2005), *at* http://www.abanet.org/journal/ereport/au26verdict.html.

Even assuming that the decision was based on an unbiased consideration of the facts and the law, public confidence in the judge's integrity has been tarnished. *See, e.g.*, Lyle Denniston, *A Constitutional Duty to Recuse?*, *at* http://scotusblog.com/movabletype/archives/2005/12/25 week/ ("Should an elected judge, who accepts large

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[13] Contributors to Karmeier also recognized the structural problem. "This is a system that has just gotten out of control," said Ed Murnane of the Illinois Civil Justice League, an association of doctors, insurers, and business groups, which was a major donor to Karmeier's campaign. Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004 (noting that Murnane "agreed with Karmeier and others that limits on spending in judicial races or other ways to elect or appoint judges should be considered").

campaign donations, sit on a case that directly affects the financial or business interests of the donors and their associates? Put as an ethical question, the answer would seem to be obvious: No."); *Justice for Sale*, *at* http://www.acrsnetwork.com/acrs/html/justice_for_sale.html (noting that post-decision interviews revealed "overall lack of faith in the judicial system, the uniform belief that justice had been sold to the entity capable of paying the most"). In a system with expenditure limits, the candidates would not face the untenable choice between rejecting contributions that compromise their perceived impartiality and losing the advantage that comes with tainted cash.

The harms caused by the candidate's dilemma can be dealt with only by collective action that promises each side that the other will not gain a competitive advantage—in other words, by adhering to a generous spending cap imposed by law. Under such a cap, neither side will be driven to raise funds out of fear of the other's excesses.

Voluntary spending limits cannot achieve this goal. The transaction costs of trying to reach an agreement on spending are too high in races involving more than two candidates, and the strategic reasons that cause candidates to engage in the fundraising race to begin with will dissuade any candidate from agreeing to limit spending if she believes she is the better fundraiser. Even if candidates were able to agree to spending limits, the distrust between them and the temptation

to outspend each other will make such agreements highly unstable.[14]

In Ohio, the state Supreme Court's effort to end the candidate's dilemma by limiting expenditures was defeated by the overly broad reading of *Buckley* recommended by Petitioners in the instant case. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1999). The *Suster* court concluded that "the language of *Buckley* and its progeny have necessarily determined, irrespective of the *kind* of position sought, that any spending restriction in any *electoral* campaign process is an infringement on a candidate's First Amendment rights." *Id.* at 530 (emphasis in original). Claiming that *Buckley* recognized only one compelling state interest, the *Suster* court refused even to consider others that might justify spending limits in judicial campaigns. *Id.* at 532 ("Although Defendants cite several other interests, the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence."). When the limits were invalidated, several candidates nevertheless made serious efforts to control their spending, producing average expenditures in the general election of approximately $800,000. Institute on Money in State Politics, State at a Glance: Ohio 2000, Judicial Elections, http://www.followthemoney.org/database/StateGlance/state_judicial_elections.phtml?si=200035. But fundraising pressures were overwhelming as soon as the next cycle, and average general election spending nearly doubled to $1.56 million in 2002.

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[14] That voluntary spending limits cannot by themselves resolve the candidate's dilemma is evident in the record below, where the District Court noted that adherence to the voluntary limits Vermont adopted in 1993 "plummeted" with "each election cycle," until no candidates agreed to participate in 1998. *Landell*, 118 F. Supp. at 465; *see also* Frank Phillips, *Kerry Spent $1.7m on Election*, Boston Globe, Dec. 6, 1996 (noting the breakdown of an agreement to limit use of personal funds following Senator Kerry's allegation that Governor Weld had violated their spending agreement for the 1996 senatorial race).

Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2002: How the Threat to Fair and Impartial Courts Spread to More States in 2002,* 19 (Justice at Stake 2004).[15] *Amici* reflect the concerns of many judges who would welcome a solution to the candidate's dilemma.

C. This Court Should Not Reach Out to Preclude States from Combating the Harms Associated with Uncontrolled Judicial Campaign Spending.

Amici have argued that if *Buckley* is read to impose a per se ban on spending limits, its key assumptions should be reexamined in this case. Because the interest in completely unfettered campaign spending decreases as expenditures cross very high thresholds, the burden of spending limits set at generous levels is not severe. Indeed, spending limits ample enough to ensure robust debate may more appropriately be regarded not as a burden, but as relief from unwelcome and relentless pressure to raise endless amounts of campaign cash. Finally, *Amici* have challenged *Buckley*'s assumption that contribution limits are adequate to guard against real and perceived corruption by describing the corrupting potential of the uncontrolled demand for every possible lawful donation. *Supra*, at 16.

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[15] The record-breaking spending in Illinois might be attributed in part to the absence of contribution limits in that state. But Ohio, which imposed $2,200 limits on contributions to 2002 candidates for the Supreme Court, Edward D. Feigenbaum & James A. Palmer, *Campaign Finance Law 2002* OH-3 (FEC), *available at* http://www.fec.gov/pubrec/cfl/cfl02/cfl02part2bsummaries.doc, saw four million-dollar campaigns in that year. Contribution limits are not designed to control spending, and they often do not do so in practice. *See* Kedron Bardwell, *Campaign Finance Laws and the Competition for Spending in Gubernatorial Elections*, 84 SOC. SCI. Q. 811 (Dec. 2003). Only the coordination mechanism supplied by expenditure caps can end the candidate's dilemma in judicial elections.

Even if this Court rejects *Amici*'s critique of *Buckley*, restraint should be exercised to ensure that the opinion in this case does not unnecessarily reach beyond the circumstances presented here. The state's interest in protecting the real and perceived integrity of candidates who are desperate for campaign cash under any system that does not limit spending does not vary depending on whether they are running for executive, legislative, or judicial office. But there are functions unique to the judiciary—its role as impartial arbiter of disputes and as an independent check on majoritarian excesses—that states have strong interests in defending and that should not be foreclosed by an unnecessarily broad decision in this case.

Whether the interests in actual and apparent judicial impartiality and independence are sufficiently compelling to justify mandatory spending limits in campaigns for the bench should await a case that squarely presents that question. To the extent that *Buckley* is read to reach that question, even though it was not presented on the facts of that case, this Court should overrule *Buckley*. States should be free to demonstrate that interests uniquely implicated by judicial campaign finance are sufficiently important to justify limits on spending in campaigns for the bench.

That option should remain open even though the harms associated with uncontrolled candidate spending could be eliminated by ending judicial elections altogether. After all, even appointment systems are not immune from the influence of money and politics—witness the battle waged on the air and the web over the three most recent U.S. Supreme Court nominations. *See, e.g., Advice, Consent, and Advertising: Television Advertising on Nominations to the U.S. Supreme Court, at* http://www.brennancenter.org/programs/scnominations/robertsnomination.html; *Withdraw Harriet Miers, at* http://withdrawharrietmiers.blogspot.com/. States originally adopted judicial elections as a means of protecting the

judiciary from the ills of patronage and partisan politics, Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860,* 45 HISTORIAN 337 (1983), and they have introduced a variety of structural changes to the electoral process in response to developments that threatened unduly to politicize the judiciary, *see* L. Berkson, *Judicial Selection in the United States, in Guide to Political Campaigns in America* 398 (P. Herrnson, ed.2005) (describing rise of nonpartisan elections); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (describing "Missouri Plan," which couples appointment with retention elections). States should now be free directly to address the most recent threat—the rising importance of money in judicial elections—through changes in their campaign finance systems, including spending limits. Precluding states from adopting such changes will not necessarily ensure the abandonment of judicial elections, but it will certainly hasten the decline of the real and perceived integrity, impartiality, and independence of the judiciary. Because Vermont's law is not applicable to judges, this Court can and should decide this case without foreclosing spending limits in judicial elections.

CONCLUSION

Amici take no position on the constitutionality of the specific spending limits at issue in these consolidated cases. For the reasons stated above, however, *Amici* respectfully request that the Court affirm the decision below as to its holding that mandatory spending limits are not unconstitutional *per se*. If the lower court's holding is rejected as to spending limits in executive and legislative races, *Amici* urge the Court to craft its decision not to foreclose the imposition of spending limits in judicial elections.

Respectfully submitted,

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February 8, 2006

APPENDIX

APPENDIX

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- Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994)
- Hon. Richard P. Guy (Washington Supreme Court, 1999-2001)
- Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995)
- Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992)
- Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001)

Former and current Associate Justices and Associate Judges of state high courts:

- Hon. Andy Douglas (Ohio Supreme Court, 1985-2002)
- Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996)
- Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993)
- Hon. Howard A. Levine (New York Court of Appeals, 1993-2002)
- Hon. Alice Resnick (Ohio Supreme Court, 1989-present),
- Hon. Cruz Reynoso (California Supreme Court, 1982-1987)

Former and current Justices and Judges of intermediate appellate and trial courts:

- Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002)
- Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977)

(R6)

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Nos. 04-1528
(Consolidated with Nos. 04-1530 and 04-1652)

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICUS* [1]

The Democratic National Committee ("DNC") is an unincorporated association that is the governing body of the Democratic Party of the United States and is the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971 as amended. 2

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

U.S.C. § 431(14). The DNC actively supports Democratic candidates in federal, state and local elections throughout the nation and is subject to federal and state campaign finance laws including, in the case of Vermont, Vermont's Act 64. The current national chair of the DNC is Howard Dean, M.D., who served as Governor of Vermont from 1991 to 2003 and, as the State's Governor, signed Act 64 into law in 1997.

Pursuant to Sup. Ct. R. 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. *Buckley v. Valeo*, 424 U.S. 1 (1976) did not foreclose the possibility that campaign expenditure limits could survive the "exacting scrutiny" test, if the government could show that such limits serve compelling governmental interests, not considered in *Buckley*, and are narrowly tailored to serve those interests.

2. Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and candidate expenditures. The candidate expenditure limits serve two fundamental and related compelling interests, neither of which was foreclosed by *Buckley*: (i) restoring integrity and faith in the democratic process in Vermont by effectively reducing the significance of private donations as a means of achieving access to and influence over elected officeholders; and (ii) promoting and enhancing access to and participation in the political process by all citizens, regardless of financial means, both as individuals and in association with each other by, *inter alia*, *enhancing* the role of political parties.

3. The second of these interests has an especially significant dimension with respect to the role of political parties. The role of parties has declined since *Buckley* as individual candidates have become entrepreneurs, able to raise and spend unlimited sums of money, making them increasingly

less dependent on party committees. As a result, the historical beneficial role of parties in achieving accountability, consensus and more effective government, has been diminished. Act 64 enhances the role of political parties by leaving them free to expend funds to support the party's message generally and to spend independently in support of their candidates. By restoring this historical balance, parties are in a better position to perform their critical functions of unifying factions in the electorate, enhancing the voice of all citizens in the political process and connecting citizens to their government. Restoring the role of parties in this way is itself a particularly compelling governmental interest.

4. The Court has afforded legislative bodies deference when they make decisions protecting the political process. Such deference is especially warranted in this case. By contrast with the campaign finance regime, for example, considered in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), in enacting Act 64 elected officials have not restricted the spending of *other* participants in the political process, but rather have decided to restrict their *own* spending in order to enhance participation in and access to the political process by their constituents, thereby restoring the faith of ordinary citizens in their democracy. Nor have incumbent legislators used the law to try to protect themselves against challengers. Act 64 likely enhances the ability of challengers because candidates' own spending is reduced significantly; the expenditure limits are actually set higher for challengers; and challengers' supporters, including in particular political parties, have the right to spend unlimited sums independently to promote those challengers.

I. BUCKLEY DOES NOT FORECLOSE CANDIDATE EXPENDITURE LIMITATIONS THAT ARE PART OF AN INTEGRATED SCHEME NARROWLY TAILORED TO SERVE COMPELLING GOVERNMENTAL INTERESTS

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that "although . . . contribution and expenditure limitations both implicate fundamental First Amendment interests, . . . expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.* at 23. Therefore, the Court ruled, the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The Court proceeded to hold that the limitation imposed on candidate expenditures by the 1974 Amendments to the Federal Election Campaign Act of 1971, 18 U.S.C. § 608(c)(1974), was unconstitutional. *Buckley*, 424 U.S. at 54-58.

The lower court in this case correctly concluded, however, that "Buckley does not permanently foreclose any consideration of campaign expenditure limitations." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). In *Buckley*, the Government asserted, and the Court considered, only three interests: (1) "alleviating the corrupting influence of large contributions;" 424 U.S. at 55; (2) "equalizing the financial resources of candidates competing for federal office," *id.* at 56; and (3) "reducing the allegedly skyrocketing costs of political campaigns . . . ." *Id.* at 57. The Court did not suggest that no government interest that could ever be asserted in a future case could ever be sufficiently compelling to meet the "exacting scrutiny" or "strict scrutiny" test. To the contrary, the Court simply concluded that, "*No governmental interest that has been suggested* is sufficient to justify the restriction on

the quantity of political expression imposed by [the] campaign expenditure limitations." *Id.* at 55 (emphasis added).

The "exacting scrutiny" test prescribed by *Buckley*, for evaluating the constitutionality of expenditure limitations, requires that the government "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 504 U.S. 191, 198 (1992), *quoting Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To be sure, it is difficult to meet that standard, but it is not impossible. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), *quoting Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)(Marshall, J., concurring). Thus, the Court of Appeals correctly held that "Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest." *Landell, supra*, 382 F.3d at 110.

II. ACT 64'S EXPENDITURE LIMITS SERVE COMPELLING GOVERNMENTAL INTERESTS

Vermont's Act 64 is a unique, integrated scheme that sets limits on both political contributions and expenditures by candidates. The Act limits candidate expenditures in any given two-year election cycle to $ 300,000 for governor; $ 100,000 for lieutenant governor; $ 45,000 for secretary of state, attorney general, treasurer, and auditor; $ 4,000 for state senator, plus $ 2,500 for each additional seat in the relevant jurisdiction; $2,000 for state representative in a single-member district; and $ 3,000 for state representative in two-member districts. Vt. Stat. Ann. Tit. 17 § 2805a(a)(2005). These limits are adjusted for inflation every two years. *Id.* at 2805a(e). In the court below, the State of Vermont asserted that at least five interests are served by the candidate expenditure limits: "(1) 'avoiding the reality and appearance of cor-

ruption . . .'; (2) 'assuring that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties;'" (3) promoting 'electoral competition and protecting equal access to political participation;' (4) 'bolstering voter interest and engagement in elective politics;' and (5) 'enhancing the quality of political debate and voters' understanding of the issues.'" *Landell*, 382 F.3d at 115. Although the Court of Appeals analyzed only the first two of these (anti-corruption and time-saving), the third and fourth interests—protecting access to political participation and bolstering voter interest—are fundamental to our democracy and are broader and more compelling than the Court of Appeals may have assumed.

A. Restoring Citizen Confidence in the Democratic System Is a Compelling State Interest

It is no surprise that, in reacting to the current lobbying and influence-peddling scandal in Washington, D.C., most voters believe that "there is widespread corruption in Washington" (58% "widespread" vs. 38% "limited", ABC News/Washington Post poll, Jan. 5-8, 2006) and that "most elected officials in Washington make policy decisions or take actions as a direct result of money they receive from major campaign contributors." (65% yes/21% no, FOX News/Opinion Dynamics, Jan. 10-11, 2006). Voters have expressed the view, in the past, that there should be a "fixed amount of money for election campaigns" and that "all private contributions from other sources should be prohibited." (65% good idea/27% poor idea, Gallup Poll, Oct. 1996).

Similarly, in enacting Act 64, the Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." Act 64, Finding (a)(4). The District Court in this case found that the trial record "overwhelmingly demonstrated that the Vermont public is suspicious about the effect

of big-money influence over politics and that voter apathy is on the rise." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). The District Court pointed to, among other things, polling finding that 74% of Vermont voters "feel that ordinary voters do not have enough influence over politics and government in Vermont." *Id.* at 469. And the District Court held that "[s]pending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*," including "'[p]reserving faith in our democracy,'" *id.* at 482-83, *quoting Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). The District Court concluded that, "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* at 483.

The Court of Appeals characterized this state interest as "avoiding corruption and the appearance thereof . . . ." *Landell*, 382 F.3d at 115, an interest which the Court in *Buckley* held did not, by itself, justify imposition of candidate expenditure limits. *Buckley*, 424 U.S. at 55. The *Buckley* Court found that the "interest in alleviating the corrupting influence of large contributions is served by the [law]'s contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Id.* Notwithstanding the Court of Appeals' characterization of Vermont's interest as being "anti-corruption" and "safeguarding its political process from such contributor dominance," *Landell*, 382 F.3d at 118-19, the real interest at stake here is *not* only in preventing the reality or appearance of "corruption"—that is, of undue influence of contributors purchased through the making of large contributions. Another, related but separate interest is in combating the perception that the need to raise and spend large amounts of private contributions—no matter how limited each individual contribution may be—naturally and inherently distorts the democratic process by forcing elected

officials to focus their time, attention, energy and priorities on those who can afford to make political contributions, at the expense of everyone else whose interests those elected officials are also supposed to be representing.

While this situation may not meet the traditional definition of "corruption," it has resulted in a loss of faith in the fairness of the electoral and political processes. This loss of faith is demonstrated by the kind of survey research considered by the District Court in this case and by lowered voter turnout and participation in the political process generally. As the Court of Appeals stated, the issue is the impact of "contributor dominance" on "the process for achieving accessibility and accountability of state officials and candidates. . . . The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system." *Id.* at 118-19. The achievement of such accessibility and accountability—and of public confidence that they exist—is a goal directly related to but different in nature than the aim of "alleviating the corrupting influence of large contributions" considered in *Buckley*, 424 U.S. at 55. It is difficult to imagine, however, a more compelling interest than restoring public faith in our democratic system.

B. Enhancing the Relative Role of Political Parties Is a Compelling State Interest

In enacting Act 64, the Vermont Legislature found that "limiting campaign expenditures will . . . encourage the personal involvement of a large number of citizens in campaigns, . . . crucial to public confidence and the robust debate of issues." Act 64, Finding (a)(8), *quoted in Landell*, 118 F. Supp.2d at 468. An important aspect of this governmental interest, not explored either by the District Court or the Court of Appeals, is "protecting equal access to political participation" and "bolstering voter interest and engagement,"

Landell, 382 F.3d at 115, in the sense that, by limiting what candidates themselves can spend, candidate expenditure limits make expenditures by groups of ordinary citizens *more* significant and thus amplify the voices of the citizenry to which the candidates are supposed to be responsive. Such limits actually promote and enhance access to participation in the political process by ordinary citizens, acting both individually and in association with each other.

In particular, Act 64 enhances the role and power of political parties. To be sure, Act 64 treats political party committees like other contributors with respect to their ability to make monetary or in-kind contributions *to* candidates: a political party cannot contribute to a candidate, or make an expenditure coordinated with a candidate, of more than $200 for state representative, $300 for state senator or county office and $400 for statewide office. Vt. Stat. Ann. Tit. 17, §§ 2805(a)-(b). A political party expenditure that is coordinated with a candidate is deemed to be a "related campaign expenditure," which is treated in the same way as a contribution. *Id.* §§ 2809(c) & (d). However, under the Act, while *candidates* are limited in what they can spend, political parties are *not* so limited. To the contrary, parties can make two categories of unlimited expenditures that can significantly promote their platforms and help elect their candidates.

First, under Act 64, party committees can freely undertake spending to promote the party, its views and platform and its candidates generally, including voter registration, voter turnout efforts and generic communications promoting the party and its positions ("Vote Democrat") without referencing specific candidates. The Vermont Secretary of State has authoritatively interpreted the Act to mean that an expenditure by a political party that substantially benefits more than six candidates "and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure,"

Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses," § 3. The result of this interpretation is that such party expenditures are *not* treated as contributions, and are therefore unlimited.

Second, under Act 64 political parties are free to make unlimited independent expenditures on behalf of specific candidates. A party expenditure is treated as a "related campaign expenditure," and thus as a contribution subject to the Act's limits, only if it is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. Tit. 17 § 2809(c). If a party expenditure does not meet this definition, it is deemed to be independent, and *not* subject to any limit.[2]

Strengthening the role of parties, as Act 64 does, is in itself a compelling governmental interest. First, it has been widely recognized that strong political parties serve a vital role in our democracy, in particular, in giving voice to ordinary citizens in the political process and combating the undue influence of special interests. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic*

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[2] While section 2809(d) of the Act creates a rebuttable presumption that a party expenditure that "primarily benefits six or fewer candidates who are associated with the political party. . . is presumed to be a related expenditure," and thus subject to the contribution limits, that presumption has been interpreted by the Secretary of State to be rebuttable—that is, a party committee may establish that its expenditure was independent by presenting "evidence that the elements of the definition" of "related campaign expenditure" were not met. Administrative Rule 2000-1, § 3(d). In any event, the presumption provision in itself is not critical to achievement of Act 64's important purposes and, if necessary, is severable from the rest of the Act. Vt. Stat. Ann. Tit. 1 § 215; *see Landell*, 118 F. Supp. 2d at 492-93.

Party v. Jones, 530 U.S. 567, 574 (2000). "[P]olitical parties are the voluntary associations principally committed to making democracy work." Nancy L. Rosenblum, *Symposium: Law and Political Parties: Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000).

Because political parties "are bodies large enough to translate the people's will into action, they bridge the gap between the electors and the government, ensuring that the people have a voice." Clarisa Long, *Note: Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1175 (1994). As one commentator has noted:

> Parties perform at least four critical functions for American democracy. They promote a competitive electoral environment ("competitiveness"); they aggregate interest groups and minorities into electoral and policymaking coalitions ("representation"); they coordinate between officials in each branch and level of government ("governance"); and they sometimes behave like other types of political organizations that exist mainly to express members' policy positions and beliefs ("expression").

Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793 (2001). "Parties are a force of unification in the divided American policy system . . . .[T]hey bring people of diverse political views together; by providing a structure to bring divergent social and ideological groups together, parties limit the destructive impact of factionalism." Amanda G. Altman, *Note: Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v Colorado Republican Federal Campaign Committee*, 46 ST. LOUIS L.J. 1001, 1030 (2002).

Second, these functions have been undermined since *Buckley* as candidates have increasingly become individual entrepreneurs, able to raise and spend unlimited sums in their

own right, and less dependent on the parties. "[T]oday, even partisan candidates build and operate organizations largely independent of the state and national parties . . . . Candidates raise their own money. They hire their own contractors . . . ." Rosenblum, *supra*, 100 COLUM. L. REV. at 814. "Those candidates who reach Congress are more independent of party selection, support and discipline today than at any previous time in our history. . . .They now owe loyalty not to a party with a reasonably coherent view of the right mix of national policy, but to a variety of narrowly focused pressure groups with disparate and conflicting views." Lloyd Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 34 (1985). These "declines in party government and party loyalty . . . are of enormous current importance . . . .[T]they go far to explain the national disappointment in the effectiveness of Congress and of the national government . . . ." *Id.* at 27.

Act 64 thus helps restore the ability of party committees, at least in Vermont, to serve the critical functions of unification, giving voice to the views of voters and achieving better governance. Enhancing and restoring the role of political parties in this way should be regarded as an especially compelling governmental interest.

C. Deference Should Be Accorded to the Decision of Vermont Legislators to Limit Their Own Spending Relative to That of Other Political Actors

While *Buckley* counseled against restricting "the speech of some elements of our society in order to enhance the relative voice of others," *Buckley*, 424 U.S. at 48-49, "those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ." *Nixon v. Shrink Missouri*

Government PAC, 528 U.S. 377, 402 (2000)(Breyer, J., concurring).

More critically, the *Buckley* language should, as a logical matter, be given far less weight when, as in this case, lawmakers are restricting their *own* campaign spending, rather than that of others. The Court has afforded deference generally to the determinations of legislators about the need for laws that regulate campaign finance, underscoring the need to "show[] proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 137 (2003). "[S]uch deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity . . . ." *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003).

In *McConnell*, for example, the Court upheld virtually all of the provisions of the Bipartisan Campaign Act of 2002 ("BCRA") even though that law sharply reduced the resources available to national and state political party committees, 2 U.S.C. § 441i, and outlawed much broadcast advertising criticizing Members of Congress, 2 U.S.C. §§ 434(f)(3), 441b(b)(2), while *increasing* the limits on contributions to the very Members of Congress who enacted the law. 2 U.S.C. § 441a(a). "We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . ." *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting).

If BCRA did not impermissibly "restrict the speech of some elements of our society in order to enhance the voice of others," *Buckley*, 424 U.S. at 48-49, then surely Act 64 does not. Far from restricting the voice of critics while enhancing their own, the Vermont legislators who enacted Act 64 did the opposite: they restricted *their own* spending, while enhancing the significance of the spending of *other* political

actors. Special deference should therefore be accorded to their judgments about the compelling need to impose such restrictions in the form of the candidate expenditure limitations.

In this regard, it is not true that Act 64's "limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents." *Landell*, 382 F.3d at 178 (Winter, J., dissenting). To be sure, as Judge Winter noted, "When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents." *Id.* at 158. Such motive and opportunity are not evident in this case, however.

First, the limits on candidate spending here are set at such affordable levels that there is little doubt that any serious challenger would be able to match the incumbent's spending—a situation that is an improvement over the typical circumstances faced by challengers. The trial record in this case included evidence that spending limits reduce the disparity between challenger and incumbent spending, and thus actually advantage *challengers*. *Landell*, 382 F.3d at 128. Second, unlike any other federal or state campaign finance law ever passed to our knowledge, Act 64 actually sets spending limits lower for incumbents than for challengers: incumbent candidates for statewide office can spend only 85% of the limit for challengers and incumbent candidates for the legislature can only spend 90%. Vt. Stat. Ann. Tit. 17 § 2805a(c). Finally, as discussed in section II(B), *supra*, the party committees are not limited in their spending on behalf of challengers, either through voter mobilization activities or through independent spending on behalf of specific challengers.

For these reasons, particular deference should be accorded to the judgment of the Vermont legislators who enacted Act 64, about the compelling need to impose candidate expenditure limitations.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

—v.—

WILLIAM H. SORRELL, et al.,

Respondents.

(Caption continued on inside cover)

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF, AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al.

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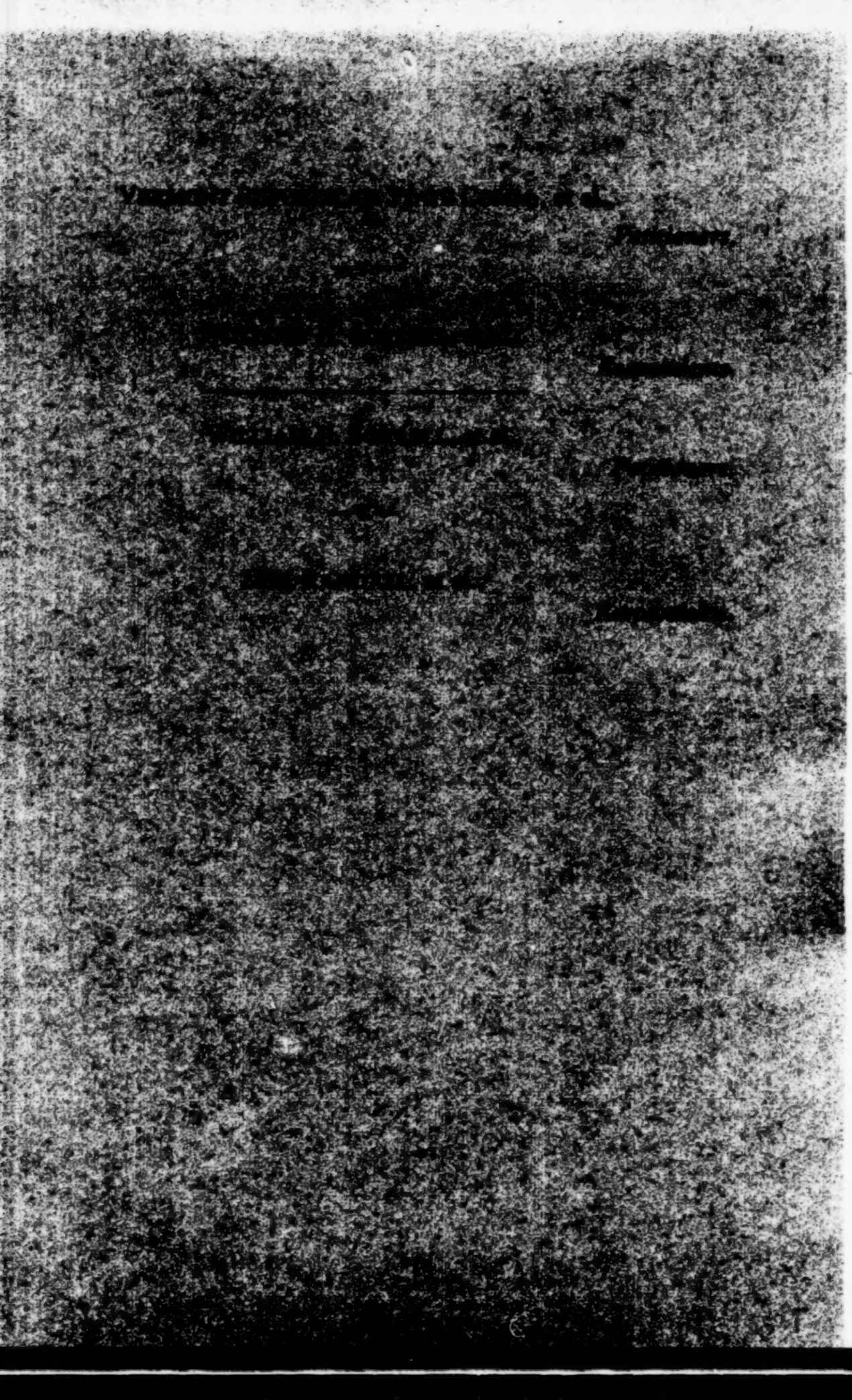

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INTEREST OF AMICI

Amici are former senior officials of the American Civil Liberties Union (ACLU).[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. Burt Neuborne served as Legal Director of the ACLU from 1981-1986. He is currently Inez Millholland Professor of Civil Liberties at New York University School of Law. John Shattuck served as Director of the ACLU's Washington office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Helen Hershkoff served as an Associate Legal Director of the ACLU from 1987-1995. She is currently Professor of Law at New York University School of Law and co-director of the Arthur Garfield Hays Civil Liberties Program. Charles S. Sims served as an Associate Legal Director of the ACLU from 1983-1986. He is currently a partner in the firm of Proskauer Rose LLP.

While a*mici* continue to support the ACLU's matchless efforts in defense of the First Amendment, we oppose the contention in this case that ceilings on campaign expenditures are categorically unconstitutional. *Amici* believe that generous campaign expenditure ceilings free candidates, voters, campaign contributors and the general public from hydraulic pressures unleashed by a limitless demand for

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[1] All parties have consented to the filing of this brief. Written copies of their consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, other than assistance by New York University School of Law in the brief's production and filing.

campaign funds that impede the development of substantive issues, breed corruption, and decrease the quality of electoral debate. Because *amici* believe that important First Amendment values exist on *both* sides of the regulatory equation in this case, we respectfully submit this brief *amici curiae* urging the Court to permit legislatures to enact generous ceilings on campaign expenditures.

SUMMARY OF ARGUMENT:

THE CURRENT LEGAL AND FACTUAL CONTEXT

As Chief Judge Walker noted below, most lower courts read *Buckley v. Valeo*, 424 U.S. 1 (1976), as requiring the invalidation of all government-imposed ceilings on campaign expenditures by candidates,[2] no matter how generous the ceiling. *Landell v. Sorrell*, 406 F.3d 159, 170 (2d Cir. 2005) (Walker, C.J., dissenting from the denial of rehearing *en banc*). *See Homans v. City of Albuquerque*, 366 F.3d 900, 914 (10th Cir.) (invalidating spending ceiling), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir. 1998) (same); *see also Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312 (9th Cir. 1992).

Indeed, in the thirty years since *Buckley*, although the precise question of a candidate-expenditure limit has not reached the Court, this Court has not sustained a government effort to limit campaign expenditures outside the narrow context of corporate spending. *Compare FEC v. NCPAC*, 470 U.S. 480 (1985) (invalidating limit on uncoordinated independent expenditures); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on use of paid petition signature gatherers); *Colorado Repub. Fed'l Campaign Comm v. FEC*, 518 U.S. 604 (1996) (invalidating ban on independent expenditures by political party prior to the selection of its

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[2] This case does not involve the related but analytically distinct issue of efforts to limit independent campaign expenditures by third-persons.

candidate) *with Austin v. Michigan Chamber of Commerce*, 494 U:S. 652 (1990) (upholding ban on corporate campaign spending).[3]

Conversely, in the years since *Buckley*, this Court has repeatedly sustained government efforts to limit the size, source and timing of campaign contributions. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (sustaining contribution limits to PACS); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (sustaining state contribution limits); *FEC v. Beaumont*, 539 U.S. 146 (2003) (sustaining corporate contribution limits); *McConnell v. FEC*, 540 U.S. 93 (2003) (sustaining comprehensive regulation of contributions).[4]

The differential judicial treatment of campaign contributions and expenditures flows directly from *Buckley*'s analytic framework. As Justice Stevens explained in *McConnell*, the *Buckley* Court viewed campaign expenditures as a form of direct speech by candidates. *McConnell*, 540 U.S. at 120-21.[5] As such, campaign expenditures may be regulated only if necessary to advance a compelling government interest. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying classic First Amendment weighted balancing test to uphold bans on electioneering within 100 feet of the polls).

Buckley held that the Federal Election Campaign Act's spending ceilings failed to advance a compelling governmental interest. The *Buckley* Court ruled, first, that the government's undoubted interest in equalizing political

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[3] *See FEC v. MCFL*, 479 U.S. 238 (1986) (recognizing "grassroots" exception to *Austin*).

[4] Coordinated expenditures have been treated as contributions. *See FEC v. Colorado Repub. Fed'l Campaign Comm.*, 533 U.S. 431 (2001).

[5] Justice Stevens has consistently questioned the equivalence between speech and money inherent in the *Buckley* analysis. *See Shrink Missouri*, 528 U.S. at 398 (Stevens, J., concurring).

power based on wealth did not empower it to limit the speech of the wealthy in order to enhance the relative political power of the less wealthy. *Buckley*, 424 U.S. at 48-49, 56-57.[6]

Second, because the *Buckley* Court did not perceive a link between expenditures and corruption, *id.* at 45-47, 55-56, the Court rejected avoidance of corruption as a justification for placing a ceiling on campaign expenditures. Accordingly, the Court did not consider whether a demonstrated link between unlimited campaign spending and an increased risk of corruption would justify a prophylactic limit on expenditures.

Third, the *Buckley* Court rejected the notion that a compelling government interest existed in reducing "wasteful, excessive or unwise" campaign spending for its own sake. *Id* at 57. Once again, the *Buckley* Court did not consider whether a showing that runaway campaign spending was adversely affecting the nature and quality of the democratic process would justify a spending ceiling. Rather, the *Buckley* Court viewed the asserted interest in reducing spending as resting solely on paternalism, and rejected it on that basis.

Unlike campaign expenditures, Justice Stevens noted in *McConnell*, the *Buckley* Court viewed campaign contributions as a form of indirect speech posing a risk of corruption. *McConnell*, 540 U.S. at 134-38. As such, the regulation of campaign contributions is subject to a less rigorous form of scrutiny, demanding only that the contribution limit be "closely drawn to match a sufficiently important interest." *Id.* at 136 (quoting *Beaumont*, 539 U.S.

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[6] The *Buckley* Court acknowledged the legitimacy of a government interest in minimizing political disparities based on wealth, but noted that strengthening the economically weak speaker was the constitutionally preferred option. *Id.* at 48-49. *See Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284-86 (S.D.N.Y.) (upholding expenditure ceiling as *quid pro quo* for voluntary campaign subsidy), *aff'd mem.*, 445 U.S. 995 (1980).

at 162). Because *Buckley* recognized a link between contributions and corruption, contribution limits are valid as long as the legislature's fear of corruption is plausible, and the contribution ceiling permits a candidate to amass sufficient resources to engage in effective advocacy. *See Shrink Missouri*, 528 U.S. at 395-96.

While the *Buckley* Court's bright-line distinction between campaign expenditures and campaign contributions has been the subject of criticism, *see Shrink Missouri*, 528 U.S. at 405-10 (Kennedy, J., dissenting); *id.* at 410-20 (Thomas, J., dissenting), it has become an entrenched principle of the law of campaign finance regulation. *McConnell v. FEC*, 540 U.S. 93 (2003). The net result is a judicially-imposed campaign-finance regulatory regime that limits the supply of campaign funds, but places the demand for campaign cash beyond government regulation. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 (criticizing the existing regulatory model).

As with any regulatory regime that limits supply but not demand, the current funding of American democracy exhibits serious dysfunction.

First, the inability to place generous ceilings on campaign expenditures places candidates in a classic prisoner's dilemma, trapping many candidates in an electoral version of the nuclear arms spiral,[7] in which rival candidates are forced to raise and spend additional campaign funds (even though neither wishes to do so) because of a rational fear that unilateral financial disarmament will enable an opponent to gain a competitive advantage. *See generally* Garrett Hardin, *The Tragedy of the Commons*, Science, pp. 1243-48 (Dec.13, 1968); Thomas C. Schelling, *The Strategy of Conflict* (1980

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[7] See Phillip Schrodt, *Richardson's Arms Race Model*, National Collegiate Software Clearinghouse, Raleigh, North Carolina (1987) (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

ed.); Robert Axelrod, *The Evolution of Cooperation* (1984); William Poundstone, *Prisoner's Dilemma* (1993); James D. Miller, *Game Theory at Work* (2003).[8]

Second, rational competitive behavior triggered by a prisoner's dilemma, creates an unending search, and a desperate need, for campaign funds, empowering self-interested contributors to exact *quid pro quos* – and worse from candidates who must obtain the contributions to keep pace with an opponent. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Speech Limits May Not Violate the First Amendment*, 94 Colum. L. Rev. 1281, 1284-89 (1994); *see also* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L. J. 147, 174 (2004); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1710-11, 1736 (1999).

Third, the hydraulic fundraising pressure generated by an uncontrollable demand for campaign cash tempts incumbents to place inappropriate pressure on potential contributors,[9] and encourages both candidates and contributors to seek an unending parade of loopholes – or worse - placing the regulatory system under perennial siege. *See Colorado Repub.* 533 U.S. at 457 ("[S]ubstantial

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[8] For an application of prisoner's dilemma game theory to the area of campaign financing, see Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem* (Available at http://law.bepress.com/cgi/viewcontent.cgi?article=2317&context=expresso) (last visited February 8, 2006).

[9] One need look no further than the current headlines to see examples of the fundraising frenzy unleashed by a limitless demand for campaign funds. *See* Anne E. Kornblut, *Lobbyist Accepts Plea Deal and Becomes Star Witness in a Wider Corruption Case*, N.Y. Times, Jan. 4, 2006, at A1; Philip Shenon, *Top Aide to DeLay Pleads Guilty to Conspiracy*, N.Y. Times, Nov. 22, 2005, at A21; Philip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. Times, Sept. 29, 2005, at A1.

evidence demonstrates how candidates, donors, and parties test the current limit of the law and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced. . . .").

Fourth, independently wealthy candidates are granted an enormous artificial advantage because they may expend unlimited campaign sums without the inconvenience of raising the funds through an expensive and time-consuming regulated process, enabling them to distort political processes without regard to public support. *See* Stephen Loffredo. *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1271-73 (1993).[10]

Finally, the impossibility of capping campaign expenditures acts as an invitation to dramatically out-spend a financially weaker opponent, leading to many elections in which one candidate so dominates the debate because of massively superior resources that an opponent is literally drowned out.[11]

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[10] Recent elections in New York and New Jersey exemplify the trend to candidates of great personal wealth. *See* David Chen, *Bloomberg Cruises to Re-election Victory; Corzine is Winner in Costly New Jersey Race*, N.Y. Times, Nov. 9, 2005, at A1.

[11] Two disturbing sets of statistics describe the movement toward overwhelming financial advantage in congressional races. In the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, while median spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. The recent figures are drawn from *The Almanac of American Politics* and the c-span.org web site, and are helpfully summarized in Allan I. Abramowitz, et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75-88 (Feb. 2006) (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

In short, the existing regime of constitutionally-mandated unlimited campaign expenditures exacts a terrible toll on American democracy, adversely affecting the First Amendment interests of candidates, contributors, voters and the public. While some candidates have a First Amendment interest in expending unlimited sums in seeking to overwhelm an opponent, most candidates and voters have important competing First Amendment interests that are jeopardized by unlimited campaign spending. These include an opponent's First Amendment interest in being heard over the din of a candidate with massively superior financing; a voter's First Amendment interest in hearing both sides of a political issue before voting; a citizen's First Amendment interest in a government that does not appear to be bought and paid for; and, most importantly, the First Amendment interests of the vast bulk of candidates who wish, at some point, to stop raising funds and to concentrate on substance, but who are unable to do so because they are trapped in a classic arms race spiral, driven by a fear that unilateral financial disarmament may be lethal.

Amici believe that the presence of important First Amendment interests on both sides of this case should translate into greater deference to legislative judgments that as long as a spending ceiling is sufficiently generous to permit effective and robust advocacy, the First Amendment benefits of capping campaign expenditures outweigh the First Amendment interests of candidates wishing to engage in unlimited spending. *See Shrink Missouri*, 528 U.S. at 399 (Breyer, J., concurring).

Accordingly, *amici* urge the Court to accept Justice Kennedy's challenge in *Shrink Missouri* to reconsider dicta in *Buckley* in a manner that permits states to enact comprehensive regulation of both campaign contributions and expenditures in order to free candidates from an endless spiral of fundraising and to permit them to focus their

energies on the substance of their campaigns. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting).

ARGUMENT

I. Generous Expenditure Ceilings Are Constitutional Because They: (A) Free Candidates From an Endless Spiral of Fundraising; (B) Counteract the Risk of Corruption Generated By Such an Endless Fundraising Spiral; and (C) Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

A. Introduction: The Available Options

Multiple approaches exist to the issue of campaign funding. One possible approach is to abandon the effort to regulate the campaign funding process altogether, leaving candidates and contributors free to raise and spend campaign funds without restriction as to size or source. Of course, even if no limits existed on campaign contributions, the persistence of an unlimited demand for campaign cash would continue to trap candidates in a prisoners' dilemma, with each candidate forced to raise unlimited amounts from self-interested donors. While a legislature could, of course, opt for such complete deregulation, the settled course of this Court's campaign finance jurisprudence upholding the regulation of campaign contributions because of the risk of corruption makes that choice clearly one for the people. Accordingly, any insistence that the First Amendment disables American democracy from defending itself against corruption and cynicism by forcing it to endure a constitutionally-imposed regime of unrestricted campaign contributions is untenable. *See McConnell*, 540 U.S. at 153 ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their

constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

Second, one could believe that public funding of elections is the best way to finance democracy. Twenty-first century government funds many activities that were once the province of private enterprise – building roads, policing the community, maintaining a Navy, providing education, operating mass transit, printing election ballots, administering elections. Adding the funding of the electoral campaign to that list is an obvious possibility.[12] Once again, however, the choice between government and private funding of the electoral process is one for the people to make. *Harris v. McCrae*, 448 U.S. 297, 313-18 (1980).

Third, one could regulate both campaign expenditures and contributions in a coordinated effort to assure generous campaign funding and robust political advocacy, without suffering the dysfunctions attributable to a completely deregulated process, or to a regime of unrestricted spending by candidates and contributors. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting); *id.* at 399, 405 (Breyer, J., concurring).

The one approach that *amici* believe cannot be defended would be to continue the current practice of regulating the supply of campaign funds in an effort to limit corruption, while insulating demand for campaign funds from any and all efforts at regulation. The resulting imbalance between restricted supply and unlimited demand breeds corruption, impedes the development of substantive ideas, and contributes to the elimination of competitive elections.

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[12] For a survey of current public financing provisions, see John M. De Figueiredo and Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. 591, 627-640, 651 (2005).

Accordingly, while *amici* believe that *Buckley* was correctly decided on its facts because the expenditure ceilings before the Court in that case were constitutionally inadequate, the dicta in *Buckley* that has been read as invalidating any effort to limit campaign expenditures no matter how generous the ceiling, and no matter how compelling the interest in restriction, should be reconsidered in light of more than thirty years of experience.[13] Generous candidate expenditure limits that permit candidates to expend "the resources necessary for effective advocacy" *Shrink Missouri*, 528 U.S. at 396 (quoting *Buckley*, 424 U.S. at 21), do not violate the First Amendment.

B. Generous Expenditure Ceilings Advance the Autonomy of Candidates by Freeing Them From Becoming Trapped in an Endless Spiral of Reciprocal "Defensive" Fundraising

Buckley employed classic First Amendment methodology. Since the *Buckley* Court determined that the relationship between campaign spending and campaign speech is so close that regulation of one is the functional equivalent of regulating the other, the Court applied a weighted balancing test derived from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to measure the constitutionality of spending ceilings. Under the *Brandenburg* test, an expenditure limit must be narrowly tailored to advance a

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[13] Such a reconsideration would not require the Court to overrule its holding in *Buckley* for two reasons. First, *Buckley*'s dicta is not entitled to any *stare decisis* effect. *See United States v. Gaudin*, 515 U.S. 506, 522 (1995); *United States v. Dixon*, 509 U.S. 688, 714 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). Second, the *Buckley* Court never considered the consequences of a prisoner's dilemma on unlimited campaign spending. See *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005) (upholding statute against First Amendment challenge on basis of government speech theory neither raised nor considered in prior cases invalidating similar statutes).

compelling state interest in order satisfy the First Amendment.

The government asserted three potential compelling interests in support of the candidate expenditure limit in *Buckley* – the avoidance of corruption, the advancement of political equality, and the desire to reduce the cost of campaigning. The *Buckley* Court rejected the equality interest, ruling that the First Amendment does not permit an effort to equalize speech by silencing the strong speaker. *Buckley*, 424 U.S. at 56-57. The Court rejected the anti-corruption justification, as well, reasoning that an expenditure did not involve a payment from a third-person, and was, therefore, not susceptible to corruption. *Id* at 55-56. Third, the Court rejected a general interest in lowering the cost of campaigning as a paternalistic effort to deem all spending above the limit "wasteful, excessive, or unwise." *Id.* at 57.

In the more than 30 years since *Buckley*, nothing has occurred to cast doubt on the Court's perception that the spending ceilings imposed by Congress in 1974 were too low to permit robust and effective advocacy, especially by candidates challenging incumbents, and their supporters. Individuals could only expend $1,000 on any particular candidate's campaign – approximately one-seventh of the cost of a one-page newspaper advertisement. *Id.* at 19 n.20. As the Court rightly recognized, this would foreclose virtually all individuals "from any use of the most effective modes of communication." *Id.* at 19. Although the candidate and party spending caps were somewhat more generous, they would have forced many candidates to curtail the scope of their campaigns. *Id.* at 19 n.21. Taken together, FECA's restrictions left little room for the kind of robust advocacy at the heart of the First Amendment.

But much has occurred casting doubt on the Court's dicta that expenditure ceilings do not advance a compelling state

interest. *Buckley* simply never considered what the past 30 years has abundantly demonstrated - absent expenditure limits, candidates, trapped in a prisoner's dilemma, must devote excessive time and energy to raising campaign funds, rendering themselves vulnerable to corruption, and unable to engage in the serious and time-consuming substantive work required of a candidate for public office.

The heart of the *Buckley* analysis was a decision to protect the autonomy of candidates. The Court reasoned that the right of a candidate to make an autonomous decision about how much money to spend is core political activity protected by the First Amendment. In support of its decision, the *Buckley* Court employed a now-familiar metaphor, analogizing money to gasoline, and campaigning to a drive in the country. *Id.* at 19, n.18.

According to the metaphor, a car/campaign is able to progress only as far as gasoline/money is available to power it. But the metaphor is deeply flawed. A political campaign is not a unilateral drive in the country, with the driver making autonomous decisions about how far he or she wishes to drive. Rather, it is a winner-take-all competition between at least two drivers, with the decision of each driver/candidate about how much gasoline/money to expend affecting and being affected by the spending of rivals. In the absence of spending ceilings binding on each candidate, rational rivals will continue to raise and spend campaign cash long after each has raised and spent sufficient funds to carry out effective and robust advocacy, not because each candidate wishes to continue the "gyre" of fundraising, but in order to guard against being outspent by a rival. Blasi, *supra*, at 1284-89, 1309; Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004). Thus, far from protecting candidate autonomy, *Buckley*'s scheme actually circumscribes it.

As with any prisoner's dilemma, in the absence of collective action, formal autonomy is overwhelmed by inexorable pressure to anticipate and react to actions by rivals. Under such circumstances, genuine autonomy is possible only if both participants are constrained by collective action. *See supra* at 5-6 & nn. 7-8.

As this Court noted in *Buckley*, an intimate link exists between money and speech, placing rival candidates in a position similar to rival powers in a nuclear arms race. During the Cold War, once each side had amassed an arsenal capable of destroying the other, neither side had an interest in continuing to expend scarce resources on enormously expensive new weapons systems. But in the absence of a collective action solution, neither power could trust the other to refrain from the deployment of new weapons that might permit the other to gain a material, potentially lethal, advantage. The result was a series of reciprocal "involuntary" investments in nuclear arms that diverted scarce resources from other uses, harming the economy and social structure of both powers – eventually causing the Soviet Union to implode, and the United States to defer badly needed repairs to its infrastructure and its social fabric. *See* Schrodt, *Richardson's Arms Race Model*, *supra* (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

In fact, while the Soviet Union and the United States were formally autonomous during the nuclear arms race, indeed, each occupied the summit of power, each was a hostage to the real or perceived actions of its rival. Formal autonomy existed; but it was the false autonomy of the prisoner's dilemma. *See* Schelling, *supra*, at Appendix A "Nuclear Weapons and Limited War."

Competitive political candidates in a regime of constitutionally-mandated limitless campaign spending exhibit the same prisoner's dilemma. In the absence of

collective action in the form of a generous spending ceiling, even after each candidate has amassed resources sufficient to engage in effective and robust advocacy, neither dares to stop raising money because of a fear that the rival will gain a competitive financial advantage. The net result is the massive and never-ending diversion of candidates' time and energy from substantive tasks, such as the development of programs and discussion of issues, to an involuntary spiral of fundraising and related tasks. *See* Blasi, *supra*, at 1285 ("No matter how long his tenure, how prominent his position, how favorable the electoral arithmetic in his district, how unimpressive and under-financed his last opponent was, . . . almost every member of Congress feels the need to amass a large war chest, just in case."); Issacharoff and Karlan, *supra*, at 1737 (observing that *Buckley*'s scheme "ha[s] made candidates and politicians into perpetual fundraisers").

Even when such an involuntary spiral does not end in corruption, it drains candidates of the time and energy needed to devote themselves to the tasks of substantive governance. As long as the expenditure ceiling is set high enough to permit effective and robust campaign advocacy, the state has a compelling interest in freeing candidates from such a prisoner's dilemma. See *Shrink Missouri*, 528 U.S. at 409 (Kennedy, J., dissenting); *Colorado Repub. Fed'l Campaign Comm., v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting).

The *Buckley* Court never considered the loss of candidate autonomy caused by a failure to establish a generous ceiling on campaign spending. Indeed, in striking down the expenditure limits before it, the *Buckley* Court appeared to be attempting to maximize the autonomy of candidates to spend as much – or as little – as they wished. Given the competitive nature of elections, however, we now understand that a constitutionally-mandated regime of unregulated campaign spending does not maximize candidate autonomy. Instead, it significantly erodes candidate autonomy by pressuring

candidates to raise and spend funds long after sufficient resources for effective and robust advocacy have been amassed, and long after they no longer wish to devote enormous time and energy to the fundraising process. Thus, as long as the ceiling is set sufficiently high to permit effective advocacy, a generous spending cap actually enhances the autonomy of both candidates.[14] Only the coordinated legislative approach envisioned by Justice Kennedy in *Shrink Missouri* that combines appropriate restrictions on campaign contributions and generous ceilings on campaign spending is capable of balancing the competing First Amendment interests of all participants in the electoral process.

C. Generous Expenditure Ceilings Counteract the Risk of Corruption Generated by "Defensive" Fundraising

Because an election is a contest, rival candidates react to each other's activities. When the activity is campaign oratory, the response is the counter-speech needed to inform the electorate. When, however, the activity is a real or perceived fund-raising advantage, a competitive candidate must respond with counter-fundraising, or else risk being unable to respond to a rival's campaign positions. *See* Issacharoff & Karlan, *supra*, at 1708 n.17 ("While spending money is by its very nature susceptible to incremental decision making, electoral outcomes in our winner-take-all system are binary: you either win or you lose. So why cut it close?").

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[14] As Judge Winter noted in his dissent below, nuclear arms and campaign spending are not equivalents. *Landell v. Sorrell*, 382 F.3d 91, 196 (2nd Cir. 2004) (Winter, J. dissenting). The former causes harm; the latter powers democracy. As the Court noted in *Buckley*, there is no general interest in removing money from campaigns. Rather, the salience of the arms race analogy is in the loss of candidate autonomy, leading to frenzied fundraising, excessive dependence on large donors, and inadequate time for substance.

When campaign spending ceilings exist at a level permitting robust oratory, the pressure to react to a rival's fundraising, while real, is mitigated by the ability of each candidate to plateau eventually at a maximum funding level that permits effective advocacy. When spending is capped, therefore, a donor who appears to expect inappropriate returns on his or her "investment" can be replaced by other donors. But when no ceiling exists, a fertile breeding ground exists for improper overtures by candidates, and inappropriate understandings with self-interested donors. That is why, as this Court has often noted, candidates, parties, and their donors, trapped in the prisoner's dilemma, aggressively push the limits of the law in an effort to satisfy the insatiable demand for more funds. *See McConnell*, 540 U.S. at 144, 165; *Colorado Repub.*, 533 U.S. at 457.

This Court has repeatedly recognized that the state has a compelling interest in minimizing real or apparent corruption in the electoral process. See *McConnell*, 540 at 136-37, 143-44; *Shrink Missouri*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28. *Quid pro quo* corruption strikes at the heart of democracy by substituting venal motives for the search for the common good. Apparent corruption is scarcely less dangerous, eroding the faith in the system without which no democracy can flourish. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 528 U.S. at 390.

Not surprisingly therefore, this Court has deferred to the legislature in identifying potential sources of corruption, and putting into place prophylactic regulatory regimes designed to prevent its appearance and/or reality. *McConnell*, 540 U.S. at 137, 165-66, 171; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for

prophylactic measures where corruption is the evil to be feared").

The deference due a legislature's choice of prophylactic means to root out corruption in the electoral system reflects the existence of broad legislative discretion when, as here, First Amendment interests exist on both sides of the regulatory equation. *Cf. Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-75 (1998); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 192-96 (1997); *Burson v Freeman*, 504 U.S. 191 (1992) (plurality opinion). In *Burson*, the Court upheld a ban on electioneering within 100 feet of a polling place in order to protect voters against subtle forms of intimidation. *Id.* at 208-09, 211. The prophylactic ban on speech in *Burson* survived strict scrutiny because constitutionally protected interests lay on both sides of the equation, requiring a degree of deference to the legislative judgment that the interest of speakers had to give way in order to ensure the integrity of the electoral process. *Id.*; *Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring).

In *Buckley*, the Court did not perceive a link between limitless campaign expenditures and the potential for real or apparent corruption. But 30 years of experience has taught that *Buckley* overlooked the competitive nature of an electoral campaign. If an electoral campaign were a unilateral drive in the country, *Buckley*'s estimate of the link between campaign expenditures and corruption would be correct. But campaigns are not drives in the country; they are winner take all automobile races. It is bad enough when one driver in the race has an unfair advantage in fuel. It becomes intolerable when the competitive need for an unlimited quantity of fuel forces both drivers to seek it endlessly under circumstances that breed corruption and erode the capacity of both drivers to consider the direction the cars should go.

D. Generous Expenditure Ceilings Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

Unlimited campaign spending adversely affects the quality of the electoral process in several ways. The never-ending "gyre" of unlimited fundraising diverts the finite intellectual and physical resources of a campaign from substance to the mechanics of fundraising. At worst, the candidate's campaign speech is limited to ideas and themes that will generate financial support from the narrow class of self-interested donors. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy and Participation*, 155 U. Pa. L. Rev. 73 (1994). At best, the candidate's time and attention is so taken up with fundraising that substance becomes an afterthought. Either way, voters are denied the full spectrum of substantive information needed to make an informed political choice.

Moreover, the prospect of raising so much money that a rival can be drowned out by massively superior resources often results in an electorate that has been subjected to a barrage on one side of the issues without effective presentation of the counter-arguments. For example, in the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, while median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. *See* Abramowitz, et al., *supra*, at 75-88 (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

While a generous spending ceiling is not intended to, and does not, assure resource equivalence, it can act to limit the effect of massive resource imbalance by preventing the

loudspeakers of one candidate from being set at a volume that effectively drowns out the speech of a rival.

Voters obviously benefit when candidates are free from settings in which corruption is endemic and attention to substance impossible. A modicum of trust in the system is a necessary incident of a successful democracy. The never-ending scramble for funds made necessary by a constitutionally-mandated failure to cap campaign spending erodes that trust. "Democracy works 'only if the people have faith in those who govern and that faith is bound to be shattered when high government officials . . . engage in activities which arouse suspicions of malfeasance and corruption.'" *Shrink Missouri*, 528 U.S. at 390 (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

Generous spending ceilings remove the unrelenting pressure to raise and spend more than one's rival – and thus permit greater attention to substance in a world not constantly dominated by the need to raise more money. As long as the ceiling is set at a point where it does not interfere with robust and effective advocacy, spending ceilings advance the compelling interest of restoring faith in the democratic process.

Finally, the vast bulk of candidates benefit when they can turn their attention to substance, free from the burden of constantly raising additional funds. The rare candidate may wish to raise unlimited funds to annihilate an opponent, but the vast bulk of candidates wish to raise enough funds to assure effective and robust advocacy, and then to devote themselves to the effective delivery of their ideas. Current practice makes such behavior impossible because candidates must engage in a perpetual financial arms race to prevent an opponent from gaining an advantage. Collective action, in the form of a spending ceiling that permits robust advocacy,

frees the candidate to concentrate on the issues, not on the perennial search for defensive dollars.

The interests of: (a) voters in receiving optimal information; (b) the general public in trusting the electoral system; and (c) candidates in devoting themselves to ideas, are as worthy of First Amendment protection as is the interest of a wealthy candidate in spending limitless amounts to swamp an underfinanced opponent. Since important First Amendment interests exist on both sides of the regulatory equation – and since the area falls within the expertise of the legislature – as long as a spending ceiling is set high enough to permit effective advocacy, the ultimate balance between and among conflicting First Amendment interests should rest with the legislature. *See Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring) (observing that campaign finance restrictions "seek to build public confidence in th[e electoral] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes"); *Landell*, 406 F.3d at 161-63 (Calabresi, J., concurring in denial of rehearing *en banc*) (emphasizing significant First Amendment interest in ensuring that all persons, not only wealthy donors, have an equal right to express the intensity of their political ideas and affiliations); *see also* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 46-47 (2005).

II. Unduly Low Spending Ceilings That Prevent the Expenditure of Resources Needed for Effective Campaign Advocacy Violate the First Amendment

Under any standard of review, unrealistically low campaign spending ceilings violate the First Amendment because they deprive candidates of the ability to expend funds needed for effective advocacy. If either contribution or spending ceilings are too low for effective advocacy, challengers will have a difficult time waging campaigns

against incumbents whose name and messages may already be well known to the voting public. *Shrink Missouri*, 5[illegible] U.S. at 404 (Breyer, J., concurring). On the other hand, the absence of generous spending ceilings, incumbents have demonstrated an overwhelming capacity to swamp challengers by exploiting the built-in fundraising advantage enjoyed by an incumbent.

It is impossible, on the current record, to determine whether the spending ceilings imposed by Vermont will unduly burden candidates in expending funds needed for effective advocacy. The answer to that question requires a fuller hearing below on the practical effect that such limits will have on the ability of candidates in Vermont to expend resources needed for robust discussion of campaign issues. While the district court conducted an inquiry into whether the ceilings accorded with past s[illegible]nding practices, and elicited some evidence concerning the impact of the ceiling on campaigning, with respect, the First Amendment requires a more searching inquiry.

The issue should not be whether ceilings will silence a candidate, or drive campaign speech below historic levels. Rather, it is whether a given ceiling will materially interfere with effective campaign advocacy. This Court has already vested the trial courts with the duty of conducting similar pragmatic fact-based inquiries in at least two related contexts. The identical legal standard is used to measure whether contribution limits are too low to permit a candidate to "amass" sufficient funds for effective advocacy. *See Shrink Missouri*, 528 U.S. at 396.

The Court's ballot access cases teach a similar lesson. When a legislature regulates access to the ballot, this Court tests the statute's constitutionality by asking whether it unduly burdens the ability of candidates and their supporters to attain a place on the ballot. *See Anderson v. Celebrezze*, 460 U.S. 783, 789-90, 792-94 (1983); *Storer v. Brown*, 415

U.S. 724, 728-30 (1974). A reviewing court is obliged to view the statute pragmatically in the context of local conditions and to gauge whether it unduly inhibits ballot access. A similar pragmatic assessment is required to determine whether spending ceilings unduly burden a candidate's capacity for robust and effective campaign advocacy. Since the district court in this case has yet to conduct this inquiry, a remand is necessary.

CONCLUSION

The decision of the court below should be affirmed, and the matter remanded to the District Court for a determination of whether the spending limits before the Court will permit sufficiently effective and robust campaign advocacy to satisfy rigorous First Amendment standards.

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New York, New York

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In The Supreme Court of the United States

NEIL RANDALL ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE ET AL.,
Petitioners,
v.
WILLIAM H. SORRELL ET AL.,
Respondents.

WILLIAM H. SORRELL ET AL.,
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v.
NEIL RANDALL ET AL.,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF EQUAL JUSTICE SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ELLA BAKER CENTER FOR HUMAN RIGHTS, LATINO ISSUES FORUM, GREENLINING INSTITUTE, ASIAN AMERICAN JUSTICE CENTER, CENTER FOR GOVERNMENTAL STUDIES, CALIFORNIA CLEAN MONEY CAMPAIGN, COALITION FOR ECONOMIC EQUITY, AND CALIFORNIA WOMEN'S AGENDA AS *AMICI CURIAE* IN SUPPORT OF WILLIAM H. SORRELL

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INTEREST OF AMICI CURIAE[1]

Amici are organizations committed to improving the lives of all people, but particularly communities of color and the underserved. The Equal Justice Society, National Association for the Advancement of Colored People, Asian American Justice Center, Latino Issues Forum, Greenlining Institute, Ella Baker Center for Human Rights, and Coalition for Economic Equity work to advance the legal and civil rights of communities of color through community education, legal advocacy, public policy research and other efforts. They believe campaign finance reform is necessary to ensure meaningful and adequate participation in the political process.

The Center for Governmental Studies, California Clean Money Campaign and California Women's Agenda join the *Amici* listed above. The Center for Governmental Studies and the California Clean Money Campaign work to ensure that elected officials are receptive to the concerns of all their constituencies and to improve fairness and transparency in government policies and processes. The California Women's Agenda seeks to better the lives of women in all arenas, including the political process. These organizations join this brief because they too believe that campaign finance reform is necessary to guarantee meaningful access to the political process and to elect national and local governments responsive to the needs and concerns of communities of color.

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[1]Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

In an ideal world, men and women of perfect virtue, vision and diversity are elected to public office. They enact laws and approve policies for the greater good unaffected by the special interests and persistent urgings of their most generous contributors. They steadfastly refuse to compromise beliefs, analyses or principles for reelection, their next targeted public office or their own ultimate financial well-being. And, campaigning for office in that ideal world would not necessitate raising and spending tens or hundreds of millions of dollars.

Few issues engender as much fire and energy as campaign finance reform. And that is because in the real world it really matters. It matters to incumbents, to their potential challengers, to vested interests and to citizens, including the communities of color sponsoring this brief—communities of citizens effectively shut out of meaningful participation in our political process. The massive amount of money contributed to and expended on campaigns for public office has an undeniable and monumental impact on who gets elected, who gets access to and is heard by those who are elected and on the ultimate decisions about issues affecting all citizens. It matters in this case because, as the Second Circuit recognized, campaign financing in Vermont is "a far cry from this idyllic vision." *Landell v. Sorrell*, 382 F.3d 91, 118 (2d Cir. 2004) ("*Landell II*") (citing statement of William T. Doyle).

The hard truth is that access, influence and meaningful participation are the private reserve of those who can pay to play in this no-limit game. And the interests and attitudes of those who can pay are very often very different from those who are members of *Amici* organizations on issues such as health care, wages, taxes, public schools, farms and factory

conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this brief that the single greatest obstacle to the ability of communities, municipalities, counties, states and Congress to redress the exclusion of communities of color from the political process is the notion that *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) absolutely bars any attempt to balance the rights of candidates to express freely their ideas with the rights of citizens to participate meaningfully in the political process. Local, state and national electorates have a strong and compelling interest in promoting greater diversity among political participants, preventing corruption and the appearance of corruption, and fostering a belief in the openness and fairness of our form of government—interests best served by contribution and expenditure limits carefully calibrated to respect candidates' rights of expression.

Forty years ago, with the passage of the Voting Rights Act of 1965, this country affirmed its commitment to the principle that all citizens are created equal in the eyes of democracy. Today, the organizations filing this brief submit that the single most important civil rights issue in American politics is the virtual exclusion of communities of color from the electoral process solely attributable to uncontrolled campaign spending. As Martin Luther King, Jr. said, succinctly and with insight in his famous "I Have A Dream" speech at the Lincoln Memorial in 1963: "We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing to vote for."

STATEMENT OF FACTS

I.

VERMONT ENACTED ACT 64 TO PREVENT CORRUPTION AND THE APPEARANCE OF CORRUPTION AND TO PROMOTE MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS.

In 1997, the legislature of Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at VT. STAT. ANN. tit. 17, §§2801–2883 ("Act 64"). Campaign finance regulation is not new to the state of Vermont. Prior to Act 64, the Vermont legislature adopted laws regulating campaign financing in 1916, 1961 and 1971. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 464 (D. Vt. 2000) ("*Landell I*"). But faced with increasingly and prohibitively expensive campaigns, Act 64 represents the first attempt of the legislature of Vermont to adopt campaign spending limits since this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in 1976.[2]

Act 64 is a comprehensive campaign finance reform package that includes regulations of contributions and expenditures related to campaigns for state office. In relevant part, Act 64 limits the amount of expenditures a candidate may make during a two-year election cycle in accordance with the position being sought and the size of contributions that candidates, political committees and

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[2]The complete statement of relevant facts is contained in the court decisions below as well as in Respondent's brief. This brief only concentrates on the points particularly relevant to issues of meaningful political participation for communities of color.

political parties may receive from a single source during a two-year election cycle. *Landell II*, 382 F.3d at 99.

The Vermont legislature found such limits necessary because candidates and elected officials respond and grant access to contributors who make large contributions in preference to those who make small or no contributions. *Landell II*, 382 F.3d at 101. Expert testimony considered by the Vermont legislature showed that "public officials are functionally compelled to sell privileged access through the fundraising system." *Id.* at 100. As Vermont senator Peter Shumlin acknowledged, "[t]here's no question (money) buys access to the system . . . ." *Landell I*, 118 F. Supp. 2d at 465 (parenthetical in original). The trial court found that the Vermont legislative records suggest "that large contributors often have an undue influence over the legislative agenda." *Id.* at 468.

Given the foregoing findings, it is unsurprising that the Vermont legislature also found that increasing amounts of unregulated campaign expenditures accompany decreasing public involvement and confidence in the electoral process. *Landell I*, 118 F. Supp. 2d at 468–69. One expert testified that "nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government." *Landell II*, 382 F.3d at 116.

Indeed, the Vermont legislature found that Act 64 was necessary to implement Article 8 of Chapter I of the Vermont Constitution, which states that "all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office . . . ." *Landell I*, 118 F. Supp. 2d at 468.

II.

THE INCREASING EXPENSE OF CAMPAIGNS EFFECTIVELY PREVENTS MEANINGFUL POLITICAL ACCESS BY COMMUNITIES OF COLOR.

Running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: STATS AT A GLANCE. In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.* The 2004 presidential race was the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.*

Although attention usually focuses on spending in federal elections, big money pervades state government politics, too. The Institute on Money in State Politics, a nonpartisan, nonprofit organization, compiled nationwide data on the 2000 state legislative and gubernatorial elections. THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002). The study showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. *Id.* at 6. The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8.

More significant than the bare numbers is the direct impact that fundraising has on a candidate's chances of winning. In the 2002 Congressional primaries, candidates

who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG STUDY"). In general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE.[3] At the state level in 2000, 83% of candidates who raised the most money won. 2000 STATE ELECTION OVERVIEW, *supra*, at 4. The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million.[4] *Id.* at 8.

Some argue that limits on campaign spending will not allow challengers to spend enough to defeat incumbents, but the numbers cited above demonstrate beyond a doubt that incumbents beat challengers even without spending limits. Incumbents are a proven commodity so fundraising for them is an easier sell. And contributions to incumbents offer both the benefit of immediate positive influence and the opportunity to place a bet on a proven winner. Available data suggests that campaign limits may produce a different outcome and encourage genuine challenges.[5]

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[3] *At* http://www.opensecrets.org.

[4] On average winners raised $4.1 million, while losers raised only $2.9 million.

[5] In 1974, the citizens of Albuquerque, New Mexico, voted to amend the City Charter, adopting a code of ethics, limits on and disclosure of campaign contributions, and limits on campaign spending. *Homans v. Albuquerque*, 366 F.3d 900, 902 (10th Cir. 2004). Between 1974 and 1995, candidates successfully challenged all four of Albuquerque's incumbent mayors who ran for reelection. *Homans v. Albuquerque*, 217 F. Supp. 2d 1197, 1200 (D.N.M. 2002). By contrast, nationally, in 1999, incumbent mayors won 88% of their races, and in 2000, incumbents won 126 out of 140 elections. Jubi Headley and Jim

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In the current pay-to-play system, candidates who lack personal wealth[6] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, cannot compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows that credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are simply unable to raise the funds necessary to compete.[7]

This money-centered focus renders candidates representing minority interests unable to compete for campaign dollars. In 42 out of 50 states legislatures,

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Welfley, *Election Results Indicate Voter Satisfaction with Local Public Servants: Incumbents Win 80 Percent of Their Elections* (Nov. 20, 2000). The amendments were enjoined in 2001. *Homans*, 366 F.3d at 903.

[6]Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG STUDY, *supra*, at 6.

[7]For example, Nathaniel Stampley, a pastor in Wisconsin, decided to run because there had never been an African-American Congressman from Wisconsin. PIRG STUDY, *supra*, at 41. Dr. Stampley raised $7,000 and garnered over 28% of the vote in the primary. *Id.* at 42. His opponent, incumbent Jerry Klezczka, raised $459,000. *Id.* Ben Allen, an African-American attorney, teacher and state representative in Georgia, contributed $20,000 of his own money and raised another $5,300. *Id.* at 17. Although he made it to a run-off, the winner, Charles "Champ" Walker, outspent Allen by $300,000. *Id.* at 18. Leo Martinez, the son of Mexican laborers, lost the Second District Republican primary in New Mexico. *Id.* at 30. Martinez ran a grass-roots campaign and raised $18,000, but lost to the top money raiser. *Id.* Gary Collins, a lawyer and member of the Executive Committee of the Middlesex County NAACP, dropped out of the primary for the Second District in Connecticut. *Id.* at 15. Mr. Collins recounted the story of an African-American woman who came up to him in the street after hearing him speak and handed him $2 dollars in change from her purse to support his campaign. Mr. Collins concluded, "She believed in me enough to want to give me that money, but she didn't understand that even if everyone in town gave me $2 in change, that's not going to get you there." *Id.* at 16.

minority legislators in 2003 raised less money for their next reelection campaign, on average, than their White counterparts. THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES, 2003, at 22 (Apr. 2005). Individually, 81.5% of all minority state legislators raised less money than the average raised by the White legislators in their state. *Id. See also* Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and Its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99 (2002) (challenger minority candidates have a more difficult time raising money than White candidates).

The current campaign financing regime similarly results in the significant underrepresentation of racial minorities in elected federal positions.[8] In the current U.S. Senate, there are only five non-White Senators.[9] Historically, only five African-Americans, five Latinos, three Native-Americans, and five Asian-Americans have served in the United States Senate. In the United States House of Representatives, 75 of 438 current members are people of color even though people of color make up approximately a quarter of the population. MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE, CRS Rep. No. RS22007, at 5 (Oct 25, 2005), *available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm.

The necessity of raising tens, even hundreds, of thousands of dollars gives the very small segment of the population capable of writing very large checks an oversized role in determining who gets elected. In the 2002 election,

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[8]Because state office often leads to federal office, pricing candidates of color out of state elections reduces the number of viable candidates of color for federal office.

[9]*See* Minorities in the Senate, *available at* http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Jan. 11, 2006).

less than one-quarter of one percent of the voting age population of the United States made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* And yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nation-wide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUB. PERSP. 29 (2000).[10] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000 and over 80% were college graduates. *Id.* Among the most active donors, over half had annual incomes of over $500,000, and only 4% had annual incomes of less than $100,000. *Id.*

Critically, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race: 99% of the donors were non-Hispanic White. *Id.* Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary

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[10]This survey was conducted by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University.

campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, but approximately 96% were non-Hispanic White. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

Economic barriers to meaningful political participation fall most heavily on the growing population of minorities. Despite the gains of the civil rights movement and growing numbers of minority citizens,[11] the gap in White versus non-

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[11]The racial composition of the United States has changed significantly since *Buckley* was decided in 1976. As evidenced by national census figures, the nation has become increasingly racially diverse. In 1976, 13% of the United States population was non-White, and the vast majority of non-Whites were African-American. U.S. CENSUS BUREAU, RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Over the decades, Whites have accounted for a steadily shrinking percentage of the population. While Whites accounted for 87% of the population in 1976 (*id.*), they accounted for only 77% of the U.S. population in 2004. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2004. Conversely, the percentage of minorities in the U.S. almost doubled between 1976 and 2004, from about 13% to approximately 23% of the population in 2004. Between 1990 and 2000 alone, the minority population in the United States grew by 43%. FRANK HOBBS AND NICOLE STOOPS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS 77 ("DEMOGRAPHIC TRENDS") (Nov. 2002).

Not only has the number of racial minorities increased, the diversity among racial minorities has increased as well. In 1976, over 98% of the population was classified as either White or Black. RESIDENT POPULATION PLUS ARMED FORCES OVERSEAS—ESTIMATES BY AGE, SEX, AND RACE: JULY 1, 1976. Today, of the over 23% of Americans who identify themselves as non-White, more than half are Hispanic, American Indian and Alaska Native, and Asian and Pacific Islander. DEMOGRAPHIC TRENDS, *supra*, at 77.

Vermont, too, has seen demographic shifts although it remains a state with very small numbers of minority group residents. Though 97% of Vermont's 608,827 residents identify as White, Vermont has followed

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White incomes has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). Minorities have significantly lower incomes than non-Hispanic Whites. In 2000, median annual family income in the United States was $52,000 while the Black family median annual income was $31,000. *Id.* at 13. Put another way, the median Black family in 2000 had an annual income equal to the national median in 1965.

This gap in wealth between non-Hispanic Whites and minorities appears to be growing. A recent study from the Pew Research Center finds that between 1996 and 2002, the median Black and Hispanic household wealth declined by 27%—while the median non-Hispanic White household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002, at 2 (Oct. 2004). The median White household wealth was $88,651—nearly fifteen times that of the median Black household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.*

It is this lack of money—not a lack of interest—that prevents minorities from effectively participating in the political process. The landmark "Citizen Participation Study"[12] found that differences in levels of activity between

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the national trend of growing diversity. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE, Matrices PL1 and PL2. Between the 1960s and the 1990s, the numbers of African-Americans, American Indians and Alaska Natives, and Asians and Pacific Islanders increased almost tenfold. DEMOGRAPHIC TRENDS, *supra*, at A-21 to A-23.

[12]Sidney Verba, Professor of Government at Harvard University, Kay Lehman Schlozman, Professor of Political Science at Boston College, and Henry Brady, Professor of Political Science at the University of California, Berkeley, conducted a large-scale, two-stage scientific survey of the voluntary activity (political, charitable and

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Whites and non-Whites were far less sharp where the activity involved time rather than money. *Id.* at 467–69. For example, while minorities donate about one percent of all political contributions, they vote at approximately the same rate as Whites. In the November 2000 elections, 53.5% of Blacks and 56.4% of Whites reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2000 (2002). Similarly, in the November 2004 election, 56.3% of Blacks, as compared to 60.3% of Whites, reported voting. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE, FOR THE UNITED STATES: NOVEMBER 2004 (2005). Minorities simply lack the disposable income that their White counterparts have to contribute to campaigns in great numbers.

In *Color of Money: 2003*, Public Campaign, a nonpartisan, public interest organization, studied the relationship between campaign money and race and showed that neighborhoods of color are severely underrepresented in the campaign finance system.[13] Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic White ($1.7 billion—85%—came in

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religious) of the American public. Sidney Verba et al., *Race, Ethnicity, and Political Participation*, *in* CLASSIFYING BY RACE 354, 355–56 (Paul E. Peterson ed., 1995).

[13]Public Campaign organized the records of more than $2 billion in individual contributions greater than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles by donor's ZIP code. PUBLIC CAMPAIGN, COLOR OF MONEY: 2003, at 1 (Major Findings) (2003). It then compared those records with data on race, ethnicity and income from the 2000 U.S. Census, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds came from predominantly African-American ZIP codes, 1.8% from predominantly Latino ZIP codes, and 0.6% from predominantly Asian and Pacific Islander neighborhoods. *Id.* at 2.

The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic White, and nearly 40% of its households have incomes of over $100,000. This *one* ZIP code contributed more campaign cash than did the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over, 84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over, 102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific American population (representing 3,523,852 people ages 18 and over, 39 times more people than live in 10021). *Id.* at 2. In other words, the evidence demonstrates first, and unsurprisingly, that the most affluent Whites are vastly ***overrepresented*** in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely *underrepresented* among campaign donors.

As diversity increases, the American political landscape necessarily changes. The prominence of issues that uniquely affect communities of color shows that the decades since *Buckley* have brought forth such change. Despite the radical demographic shifts and changing political landscape, communities of color continue to struggle to be heard and for equal treatment. As evidenced by the Court's decision in *Grutter*, there remains a compelling need to intervene and to correct the persisting symptoms of past racial discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

Today, the increasing cost of campaigns recreates the racial disparity and exclusion of communities of color. If the voices of Americans of color continue to be drowned out by moneyed interests, America will fail at least a quarter of its population. Ensuring that all individuals—no matter their race or color—have meaningful opportunities to participate in and influence the political process is essential to the success of American democracy.

LEGAL ARGUMENT

I.

BUCKLEY DOES NOT ESTABLISH A PER SE PROHIBITION AGAINST EXPENDITURE LIMITS.

In *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam), this Court did not hold that expenditure limits were per se prohibited, but rather held that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction on the quantity of political expression imposed . . . ."[14] *Id.* at 55 (emphasis added). Based on a slim court record, the Court assumed that "there is nothing invidious, improper, or unhealthy in permitting such [unlimited] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. As the Second Circuit correctly recognized, "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell II*, 382 F.3d at 107–08.

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[14]Because the scope and effect of *Buckley* with respect to expenditures is thoroughly addressed in the parties' briefs as well as in the Second Circuit's opinion in this case, *Amici* focus instead on the fact that expenditure limits are necessary to and justified by the rights of citizens to participate meaningfully in the political process.

In the decades since *Buckley*, empirical evidence reveals that the percentage of minorities who are able to contribute financially to campaigns is almost negligible[15] and that a candidate's financial support bears little relation to his or her support among minority constituents. Support for a particular candidate by communities of color has become irrelevant in an America where the vast majority of campaign contributors are non-Hispanic White.

To be sure, given the large number of minority voters nationally, presidential candidates consider the views of leaders representing communities of color and, in certain states with significant numbers of voters of color, some access is granted by gubernatorial and Senate candidates, especially during the campaign period. But as all studies reflect, access thereafter is very highly correlated with campaign contribution dollars. This disparity leads to at worst, the appearance or actuality of corruption, and at best, an unfair and exclusionary system.

Because contribution limits alone have not—indeed, cannot—adequately further the government's interest in protecting the political process from both actual corruption and apparent corruption, states should be allowed the flexibility to craft well-researched and carefully thought-out campaign finance reform laws that utilize a variety of mechanisms, including reasonable expenditure limits. Without such flexibility, communities of color will continue to be shut out of meaningful participation in our democratic process.

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[15]This lack of participation is not due to a lack of interest as differences in participation rates between Whites and non-Whites became far less pronounced when the political participation involved time instead of money. *See* discussion at p.10, *supra*.

II.

PROMOTING MEANINGFUL PARTICIPATION IN THE POLITICAL PROCESS IS AN ADDITIONAL COMPELLING INTEREST SUFFICIENT TO SUPPORT VERMONT'S REASONABLE LIMITS ON CAMPAIGN SPENDING.

Vermont put forth five interests that it believed were sufficiently compelling to warrant its reasonable limits on campaign spending. The Second Circuit found that two of those interests—"avoiding the reality and appearance of corruption in elective politics and government" and assuring that "candidates and officeholders [will] spend less time fund-raising and more time interacting with voters and performing duties"—taken together, supported Vermont's expenditure limits and declined to evaluate the remaining interests. *Landell II*, 382 F.3d. at 115, 125.

Among the three interests advanced by Vermont that the Second Circuit did not evaluate was Vermont's interest in "protecting equal access to political participation." *Id.* at 115. Although the sufficiency of this interest was not discussed by the Second Circuit, the *Landell I* court acknowledged that spending limits are an appropriate response to the compelling governmental interest of "[p]rotecting access to the political arena." 118 F. Supp. 2d at 482–83. In fact, the *Landell I* court found that "the categorical preservation of free speech and association cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government." *Id.* at 493.

The *Landell I* court correctly recognized it was charged with reconciling competing interests. Indeed, *Amici* believe that the tension between the interest in ensuring meaningful participation in the political process for all members of the

electorate and the First Amendment interests in political speech lies at the heart of the debate over the constitutionality of campaign expenditure limits. As the *Landell I* court noted, "the exercise of those [free speech] freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others." 118 F. Supp. 2d at 493.

Courts balance competing constitutional interests often. Indeed, this Court has recognized the need to balance First Amendment protections of political speech against core democratic interests. As Justice Breyer pointed out in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the "Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ."[16] *Id.* at 402 (Breyer, J., joined by Ginsburg, J., concurring). When faced with these competing interests, the Court does not privilege one interest over another, but weighs the interests and seeks solutions that maintain the integrity of American democracy. *See id.*

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[16]Examples of this balance abound. In *Nixon*, Justice Breyer offered two examples where speech has been restricted to protect other core democratic interests. Specifically,

> in Congress, for example, . . . constitutionally protected debate, Art. I, §6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate. (*Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring) (citing *Storer v. Brown*, 415 U.S. 724, 736 (1974)))

Similarly, in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld restrictions under the Hatch Act limiting the political activity of federal employees. Even in *Buckley*, when evaluating contribution limits, the Court weighed the government's interest in the prevention of corruption against First Amendment freedoms.

While expenditure caps limit to some extent the paid political expression of a wealthy few, they are important to ensure Americans, especially its people of color, can meaningfully participate in the political process. Any analysis of expenditure limits must keep in mind that the special attention given to political expression under the First Amendment is rooted in the protection of these democratic principles.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court recognized that government has an essential interest in promoting political participation by Americans of color: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. The *Grutter* Court found a compelling government interest in ensuring that minorities participate in American's education system and stated that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But the government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to government leadership, and the government has a vital interest in keeping America's political system open to all members of society. As we work together as a country to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine these accomplishments if we effectively deprive the graduates of these programs of office,

of access, and of a sense that the government understands and is receptive to their views.

This Court has endorsed important interests of the government in promoting meaningful political participation. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." *Id.* at 206 n.88 (citation and internal quotation marks omitted). Political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court upheld a prohibition on corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging meaningful political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate is an election that appears up for sale.[17]

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[17]In an *amicus* brief submitted to the Court, Senator Mitch McConnell challenges Vermont's interest in "protecting equal access to political participation." *See* McConnell Amicus Brief at 13-18. Although the *Buckley* Court found that the "interest in equalizing the financial resources of candidates" is not a convincing justification (*Buckley*, 424 U.S. at 56), it did not reject the interest in protecting access to political participation. Meaningful political participation is simply not synonymous with "the equalization of political speech" interest rejected in *Buckley*.

Neither Respondents nor *Amici* argue for reasonable campaign spending limits based on an abstract principle that all candidates should have the same amount of money to spend. Such an argument misses the point. Rather, at issue here are the consequences of entirely unrestrained spending, as documented by the Vermont legislature and in study after study, including the resulting virtual exclusion of communities of color from the political process and from political office. Nothing less.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth . . . ." *Id.* at 666. Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. *Id.* at 144; *see id.* at 136–41 & nn.1–17. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. (*Id.* at 143)

"[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*; *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[18] The diminishment of minorities' rights to participate in the political process also touches on fundamental constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes . . . ." H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views).

Even as it enacted major reform, Republican Congressmen predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .

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[18] 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a more virulent variety than exists today. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds with which they may outspend opponents, candidates for office are forced to give access and time to those who can provide money.

The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." 424 U.S. at 48–49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Nixon*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). One valid basis for upholding limits on campaign expenditure limits, Justice Breyer noted, is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process." *Id.* at 401 (citations omitted). The Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be "wholly foreign" is a political system in which free speech is measured only in dollars and in which major segments of society are excluded and are as powerless to influence the choice of candidates and public policy as they were decades ago. Legislators and citizens can and should be permitted to balance competing and compelling government interests with carefully drawn limits that still protect—indeed encourage and permit—widespread communication of ideas and positions. The Vermont

legislature did so in enacting Act 64. The district court and Second Circuit did so in upholding parts of Act 64 and *Amici* ask that it be sustained.

The Court's decision will not only affect the citizens of Vermont, but it will determine whether the next generation of Americans of color throughout the nation will be given a voice and a place at the political table.

CONCLUSION

Amici urge the Court to hold that governments have compelling interests in promoting meaningful participation by *all* members of the electorate and that this interest is sufficient to support Vermont's limits on campaign spending.

DATED: February 8, 2006.

Respectfully,

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Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

WILLIAM H. SORRELL, *et al.*,

Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,

Cross-Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* FORMER SENATORS BILL BRADLEY AND ALAN SIMPSON IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici former Senators Bill Bradley and Alan Simpson urge the Court to affirm the ruling of the United States Court of Appeals for the Second Circuit in favor of Respondents. This case addresses a constitutional question of great magnitude concerning this Court's First Amendment jurisprudence in the context of campaign finance reform.[1] The issue presented herein is whether the State of Vermont's campaign expenditure limits are justified by a compelling government interest.

Bill Bradley is a former United States Senator, and a Democrat from New Jersey. He was first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997. In addition, Senator Bradley ran for the Democratic Party nomination for President of the United States in the 2000 election cycle.

Alan Simpson is a former United States Senator, and a Republican from Wyoming. He was also first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997.

Having served the nation in the United States Senate, *amici* swore an oath to "support and defend the Constitution of the United States" and to "well and faithfully discharge the[ir] duties."[2] In addition to their service in

---

[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

the Senate, *amici* have raised millions of dollars for their campaigns, for their respective parties, and for other candidates. *Amici* are proud of their service in the legislative branch; however, as former members of a coordinate branch, they feel compelled to advise the Court of their utmost concern for the problem presented. With a sense of continuing obligation to serve to the nation, *amici* file this brief in support of Respondents.

SUMMARY OF THE ARGUMENT

This case raises the question whether the immense time commitment of fundraising detracts excessively from the effective performance of elected officials. Without expenditure limits, campaign costs have escalated and fundraising has become an inordinately time-consuming job for candidates and office holders. Due to the excessive demands of fundraising, it is difficult for elected officials to fulfill their duties. As a result, the quality of representation has declined, and the integrity of elected office has been undermined. Thus, protecting the time of elected officials from the burdens of constant fundraising presents a compelling government interest, an interest which was not before the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

For these reasons, the Court should affirm the constitutionality of the State of Vermont's campaign expenditure limits. In the alternative, *amici* urge the Court to hold that protecting the time of candidates and elected officials from the onerous demands of fundraising is a compelling government interest that justifies campaign finance reform measures, and to remand to the lower court for a

determination of whether the Vermont statute is narrowly tailored to achieve this compelling government interest.

Because fundraising increasingly dominates the time of candidates, the integrity of the American system of republican government is deteriorating, as time is taken from the many and focused on asking for money from the few. The instant case provides the Court with an opportunity to consider issues that are central to the integrity of our system of representative democracy, as States and localities across the nation seek to address the impact of fundraising on campaigns and on officials' performance in elected office.

I. THE SPIRALING COSTS OF CAMPAIGNS TAKE ELECTED OFFICIALS AWAY FROM THEIR SWORN DUTIES.

A. In The Absence Of Spending Limits, Campaign Costs In Federal, State And Local Elections Have Escalated.

In the 30 years since the Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), the costs of running a successful campaign for local, state and national office have rapidly escalated. In 1978, *Amicus* Senator Bradley spent $1,688,499 in his campaign for a United States Senate seat in New Jersey. CENTER FOR RESPONSIVE POLITICS, BILL BRADLEY; bradbil.pdf, *available at* http://www.opensecrets.org. In 1990, a mere 12 years later, *Amicus* Senator Bradley spent nearly $12.5 million in his reelection bid, raising approximately forty thousand dollars per week, every week for six years. Likewise, in the 1990 senatorial race in Wyoming, *Amicus* Simpson spent $1,443,298 to win re-election, 3.3 times the amount spent in 1978. CENTER FOR RESPONSIVE

POLITICS, ALAN SIMPSON; simpsala.pdf, *available at* http://www.opensecrets.org.

Overall Congressional candidate fundraising increased 425 percent between 1978 and 2000, compared to 170 percent inflation during the same period. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 7 (2003). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from $359,577 to $848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase. Similarly, the average victorious Senate campaign in 1986 cost $3,067,559 compared to $7,389,176 in 2000 – a 154 percent increase, adjusted for inflation. *Id.*[3]

In the realm of presidential politics, spending has escalated at an even more alarming rate. In his bid for the 2000 Democratic Presidential Nomination, Senator Bradley, although no longer a member of the Senate, raised $8,607,781 in campaign contributions in his most successful fundraising quarter. FEDERAL ELECTION COMMISSION, "Large Fundraising Quarters in Pre-Election Years For

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[3] The following breakdown is particular noteworthy. In 1992, the average Senator had to raise nearly $13,000 each week for the entire six-year term in order to amass the amount that a winning Senate race would cost. Herbert Alexander, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992). By 2001, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise $10,000 *per day*. 145 Cong. Rec. S12575, S12608 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer). In fact, she raised money at almost twice that rate. For her 2004 re-election, Sen. Boxer raised a total of $16.7 million. Of that, in the 2003-04 cycle she raised $13.8 million. Divided evenly over two years and 365 days per year, this amount equals $18,904 per day, every day, weekends and holidays included. http://www.opensecrets.org/politicians/summary.asp?CID=N00006692&cycle=2004.

Presidential Primary Campaigns," *available at* http://www.fec.gov (measured from October 1, 1999 through December 31, 1999). Sitting Vice President Al Gore, the eventual Democratic Party nominee for President, had his largest fundraising quarter in the first quarter of 1999, during which time he raised $8,881,976. *Id.* (measured from January 1, 1999 through March 31, 1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in 91 days, while still serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the 2004 presidential election, which shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and raised a combined total of $496.6 million in contributions from individuals. FED. ELECTION COMM'N, REPORT OF RECEIPTS AND DISBURSEMENTS: BUSH-CHENEY '04 INC. (Sept. 20, 2004), *available at* http://www.fec.gov; REPORT OF RECEIPTS AND DISBURSEMENTS: JOHN KERRY FOR PRESIDENT INC. (Sept. 20, 2004), *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As A Result, Elected Officials Spend An Excessive And Ever-Increasing Proportion Of Their Time Raising Funds For The Purposes Of Re-Election And Election To Higher Office.

Spiraling campaign costs cause elected officials to spend an excessive and ever-increasing proportion of their

time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress spend many hours – every day and every week raising money, "dialing for dollars,"[5] and attending fundraisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized. . . . When I was running, I was

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[4] *See, e.g.*, 147 Cong. Rec. S2603 (daily ed. Mar. 21, 2001) (statement of Sen. Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch an effective campaign."); 133 Cong. Rec. S7782 (daily ed. Sept. 21, 1997) (statement of Sen. Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A1 (quoting Sen. Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," (Statement of House Minority Leader Robert Michel); "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," (Statement of Rep. Dave Durenberger); Larry Makinson, SPEAKING FREELY 36-37 ("When I was here in Washington I would go over to the [National Republican Congressional Committee] or the Senatorial Committee offices to make telephone calls for an hour, two hours every day. When I was home in Florida . . . that's the bulk of what I did. It's a very time-consuming process." (Statement of Rep. Bill McCollum).

spending about two hours a day on the phone raising money. Minimum. Six days a week." Martin Schram, SPEAKING FREELY 38.

Moreover, in order to meet the inordinate demands of a successful fundraising campaign, elected officials must begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. As one Senator put it, "[a]s soon as a Senator is elected here, that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S1053 (daily ed. Feb. 22, 1988) (statement of Sen. Harkin). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan. 6, 1987) (statement of Sen. Byrd).[7] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman).

Indeed, fundraising not only takes time, but it also literally takes officials away from their work. Elected officials travel frequently in order to raise money, not only within their own states, but also to states with high

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[7] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for re-Election*, THE OREGONIAN, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election day).

concentrations of wealthy donors.[8] Candidates and elected officials cast a wide net – beyond their constituents and voters, and outside their home region – in order to raise the money needed to run a successful campaign. For example, in South Dakota in 2004, 92% of the money raised by incumbent Senator Tom Daschle came from outside of the state, as did 78% of that raised by his opponent, Jon Thune.[9] A general breakdown of 2004 fundraising data shows a chase to several hot spots around the country with high levels of campaign contributions, with the New York City metropolitan area leading with nearly $150 million, and Washington DC not far behind at $135.4 million.[10] Other stops on the campaign money tour include Los Angeles and San Francisco on the west coast, Chicago in the Midwest, and Boston and Philadelphia back on the east coast.[11] As a result, candidates must spend much of their time flying back and forth

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[8] For example, in 1986, then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 NAT'L J. 1448, 1448 (1990); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1998) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer") (Statement of Rep. Wyche Fowler).

[9] Statistics are published at http://www.opensecrets.org/races/instate.asp?ID=SDS1&cycle=2004&special=N.

[10] *Id.* For the top 10 most expensive Senate races from the 2004 cycle, reflecting the 20 major party candidates, the average candidate received 39.1% of her funds from out-of-state-contributors. This data was compiled from information published at www.opensecrets.org.

[11] http://www.opensecrets.org/overview/topmetro.asp?cycle=2004.

across the country – from New York to Hollywood – raising money.[12] As Sen. Wyche Fowler commented, "It takes two to three years of constant travel – you cannot, under today's system, raise [enough] money in your own state. And therefore, the time expands exponentially, because you're crisscrossing the country."[13] While this speaks of conduct at the federal congressional level, these concerns are just as prevalent at the local level. Candidates across all offices, state and federal, and across all parties, are spending considerable time raising money.[14] In Vermont specifically, the record below amply demonstrates that candidates and elected officials constantly faced the need to leave the State in order to find sufficient campaign

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[12] As one House member put it, "people would be genuinely unhappy about how much time members have to spend on fundraising. . . . And in many cases, because there is such competition for the dollars, you can't do it over the phone. You've got to get on a plane and fly to New York or Chicago or Miami or Dallas or Los Angeles. Hollywood, Wall Street." SPEAKING FREELY (1995) at http://www.opensecrets.org/pubs/speaking/speaking03.html (statement of Rep. Dennis Eckart).

[13] *Id.* (statement of Sen. Wyche Fowler). Senator Dennis DeConcini of Arizona reflected on a fundraising event as follows: " . . . And I'm in New York. Beautiful apartment facing the park. I'd never been there before. Didn't know the people who owned the apartment, who'd just raised me 46,000 bucks." SPEAKING FREELY (1995), available at http://www.opensecrets.org/pubs/speaking/speaking02.html (Statement of Sen. DeConcini). This reflects a transactional, commerce-like approach where money replaces ideas as the sole object, and candidates and elected officials blindly follow the money.

[14] For example, one study found that throughout the nation, 55 percent of candidates for state-wide office devoted more than one-quarter of their time to fundraising activities. Paul S. Herrnson and Ronald A. Faucheux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), at http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

cash.[15] Thus, fundraising not only takes time, it also takes the candidates and officeholders away from their voters and constituents.

The demographics of the donor class[16] further illustrate the way politicians and elected officials spend their time. The Center for Responsive Politics reports, "Less than one-tenth of 1% of the U.S. population gave 83 percent of all itemized campaign contributions for the 2002 elections."[17] Donors who contribute the maximum $2,000 allowed under federal law represent approximately one-tenth of 1% of the nation's adult population.[18] Under the current system, an efficient candidate focuses on raising hundreds of thousands of dollars from those who can give the most. This time is spent not with ordinary voters and constituents, but rather with the wealthy few who can help the candidate most quickly reach her

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[15] Republican State Senator William Doyle observed, "Fundraising in recent years has concentrated on out-of-state fundraising events. The reason for this is that it's much easier to raise out-of-state-money, either in Washington, New York or California." Floor Speech of Senator William Doyle (R), Ex. Vol. I, E-0092. Democratic State Senator Cheryl Rivers testified that Vermont legislators are expected to attend out-of-state fundraising events sponsored by parties and PACs, where donors gain access to the legislators. (Trial testimony of Senator Cheryl Rivers, Tr. VII-58-61). In terms of numbers, 73 percent of campaign contributions to Gov. Howard Dean's 1994 campaign were from out-of-state donors, primarily in the health care industry. Tr. IX-198 (trial testimony of Anthony Pollina).

[16] This terminology is effectively described and developed in Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PENN. L. REV. 73 (2004).

[17] http://www.opensecrets.org/pressreleases/DonorDemographics02.asp.

[18] http://www.opensecrets.org/overview/DonorDemographics.asp?cycle=2002. Contributions of $200 or more come from about one-half of one percent (0.52%) of the nation's population. *Id.*

fundraising goals. Out of necessity, time – that precious commodity – is lavished on the few.

Further, on a practical, everyday level, fundraising takes elected officials away from their place of work in the halls of government. For example, Members of Congress are not permitted to make fundraising calls from their Congressional offices, 18 U.S.C. § 607(a), and must rent separate office space for those purposes. As one Representative stated, "I rented an office on Capitol Hill, and between votes [in the House] during the time I was running for the Senate, I just camped out in that office most of the time and made phone calls." Schram, SPEAKING FREELY, *available at* http://www.opensecrets.org/pubs/speaking/speaking03.html (Statement of Sen. Mel Levine) (1995).

In sum, the current system relentlessly pressures office holders to spend a vast amount of their time fundraising, to the exclusion of other pursuits of campaigning or the public business.

C. The Time Spent Fundraising Diminishes The Quality Of Representation That Elected Officials Provide, And Undermines The Integrity Of The Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." James R. Carroll, *Senate Rejects Limits on Donations*, THE COURIER-JOURNAL, Mar. 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators do not devote their time to legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with their

colleagues. As Senator DeConcini stated, "[fundraising] takes away from your ability to represent your constituents, or to do your legislative work." Martin Schram, SPEAKING FREELY 38.

Thus, many legislators neglect their legislative duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[19] Legislators often feel that they do not have the time to meet with or directly represent their constituents. As Representative Christopher Shays lamented, "[Elected officials] spend far too much time fundraising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H339 (daily ed. Feb. 13, 2002) (Statement of Rep. Shays). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING

[19] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, L.A. TIMES, July 24, 2000, at A3 (detailing a Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amounts of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, both Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[20] Representative Vin Weber stated, "when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending to their sworn duties and raising money for the purposes of re-election or election to a higher office.[21] One Congressman stated that the time

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[20] *See, e.g.*, 145 Cong. Rec. H8225, H8236 (daily ed. Sept. 15, 1999) (statement of Rep. Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens. . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H6937, H6943 (daily ed. Aug. 3, 1998) (statement of Rep. Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing. Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S5858 (daily ed. May 15, 1991) (statement of Sen. Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

[21] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators

(Continued on following page)

spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[22] While elected officials may prefer to spend their time serving the public, political survival demands that they make these choices.

Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office.[23] Because they are consumed with fundraising, candidates do not have time

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surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1998); *see also* Larry Makinson, SPEAKING FREELY 39 (2d Ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Rep. Tim Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," (Statement of Rep. Leslie Byrne) and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," (Statement of Sen. Howard Metzenbaum).

[22] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had "been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

[23] Naturally, a large percentage of candidates will be current officeholders. There are incumbents seeking re-election, as well as elected officials seeking higher office. An analysis of the 2004 Senatorial elections shows that 68 individuals ran for office for 34 Senate seats, and that of these 70% were elected officials. CQ VOTING AND ELECTIONS COLLECTIONS: EXPERT ANALYSIS, DEMOGRAPHICS AND DATA.

during their campaigns to engage the issues or the voters, to debate their opponents or to discuss ideas.[24]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed an "institutional concern about the integrity of the U.S. Senate." Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM, at 4, 51 (1992). Former Senator Dennis DeConcini said, "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and raise money for my next election. And that always has bothered me from the standpoint of what I

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[24] *See, e.g.*, Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, PHILADELPHIA DAILY NEWS, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face."); 133 Cong. Rec. S7782 (Statement of Sen. Hollings) ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Rep. Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, ROCKY MOUNTAIN NEWS, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer saying that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

think the people elected me to do." Schram, SPEAKING FREELY 40.[25]

The most recent presidential election cycle provides a final compelling example of the negative effects of unlimited spending. The two major party nominees, both current office holders, decided to forego the public financing available in the primaries.[26] Instead, President Bush and Senator Kerry raised money at a pace of at least one million dollars per day, every day, while also serving as federal office holders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that the time of these two public servants, and that of all elected officials, is a compelling interest worth protecting.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO *BUCKLEY V. VALEO*.

A. *Buckley v. Valeo* Allows That A Compelling Government Interest Could Be Presented That Would Justify Campaign Expenditure Limits In Light Of The Interest In Preserving The Integrity Of Our System Of Representative Democracy.

In *Buckley*, this Court held that laws that restrict campaign contributions or expenditures must meet exacting

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[25] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[26] President Bush raised these sums even though he faced no serious primary opponent.

scrutiny.[27] The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived exacting scrutiny on the grounds that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 142-45 (2003) (extending this rationale to justify limits on soft money contributions). As set forth in greater detail below, just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Thus, *Buckley* and this Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of

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[27] *Amici* suggest that the Court may also consider whether strict scrutiny is required when reviewing campaign finance reform measures, or whether a lesser level of scrutiny would suffice. Irrespective of the level of scrutiny, *amici* submit that there is at least a compelling government interest.

representative democracy.[28] Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley* spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[29] Similarly, Justice Breyer, in an opinion joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws,

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[28] Contrary to Judge Winter's dissent in *Landell v. Sorrell*, 382 F.3d at 188-89, this issue has not yet been addressed by this Court and was not considered or developed as a compelling state interest in Buckley.

[29] Several appeals courts and judges have opined that time protection is a compelling government interest. In the instant matter, the Second Circuit observed that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit has affirmed that the time protection rationale is a compelling government interest. A concurrence in the Sixth Circuit offers a similar perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). In a recent Tenth Circuit case, Circuit Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans v. City of Albuquerque* and *Rue v. City of Albuquerque*, 366 F.3d 900, 911 (10th. Cir. 2004), *cert. denied*, 125 U.S. 625 (2004). Nonetheless, majorities in the Sixth and Tenth Circuits ultimately found that there was no compelling government interest justifying the expenditure limitations at issue.

so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

B. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital To Our System Of Representative Democracy And Would Serve A Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to the principles set forth in *Buckley v. Valeo*. Fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure limits serve a compelling government interest: they safeguard the integrity of the electoral process and our Republic, and they protect the time of legislators who are duty-bound to serve their constituents and abide by their oath of office.

Protecting the core functions of elected officials is central to the strength of the American Republic. The American Republic is founded on the notion that elected representatives serve the people. As James Madison wrote in FEDERALIST 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art.

I; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[30] This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Likewise, the Constitution directly protects the core functions of legislators in the Speech or Debate Clause, which protects Members of Congress as they carry out their essential functions as legislators, including debating and voting on legislation: "The Senators and Representatives shall ... be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House." U.S. CONST. art. I, § 6. This Court has held that the Speech or Debate Clause is to "be read broadly to effectuate its purposes."[31] Further,

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[30] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S. CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

[31] *United States v. Johnson*, 383 U.S. 169, 180 (1966), citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *See also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation").

in *Powell v. McCormack*, this Court held that the purpose of the Speech or Debate Clause is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks. . . ."[32] The Clause has been held to protect more than just literal speech and debate: "it would be a narrow view of the constitutional provision to limit it to words spoken in debate."[33] The protection of the Clause has been applied to various acts, "to things generally done in a session of the House by one of its members in relation to the business before it."[34] This clause underscores the profound importance of these critical legislative functions. "[D]istracting or deterring even a few individual members of a collective legislative body can, of course, undermine the capacity of the body as a whole to do its lawmaking work . . . "[35]

Accordingly, the government has a compelling interest in protecting the time of elected officials who are increasingly forced to spend large amounts of time fundraising instead of legislating, debating, and serving their constituents and the nation.[36]

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[32] *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

[33] *Kilbourn*, 103 U.S. at 204.

[34] *Id.* The Speech or Debate Clause is not without limits. Its protection "has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 624.

[35] *Id.*

[36] *Amici* do not argue that the Speech or Debate Clause on its own provides the sole basis for upholding Vermont's campaign expenditure limits, but it reinforces the central point that there is constitutional support for protecting the time of legislators to do their jobs in an unencumbered fashion.

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. This time could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vincent Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994).[37] When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

C. Because Fundraising Drains Candidates' Time, Campaign Expenditure Limits Directly Serve A Compelling Government Interest In Protecting The Integrity Of The Electoral Process.

Active and vocal campaigns are integral to American constitutional democracy. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citing *Buckley* and noting that the Supreme Court has "recognized repeatedly that 'debate on the qualifications of candidates

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[37] *See also* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U.-CHIC. L.J. vol. 4 http://www.ssrn.com/abstract=816244 (forthcoming 2006), 40-44 ("Time stolen for fundraising activities thus both diminishes the representation provided by an individual elected official and the overall capacity of the body to function to its fullest.").

[is] integral to the operation of the system of government established by our Constitution"). Campaigns are the heart of a healthy electoral process. As the *Buckley* Court observed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. at 14-15. Thus, campaigns provide for an instrumental dialogue between candidates and voters that is central to the "uninhibited, robust and wide-open" public debate that in large part defines the republican form of government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[38] Campaign spending limits directly protect the time of candidates so that they can, in any manner they choose, participate fully in this essential conversation.

This Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in

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[38] Campaigns serve a crucial function as public fora in which the people express their views. "The conversational model posits that the backbone of democracy, the source of much of the popular respect it commands, and hence much of its strength and stability, is to be found . . . in involvement of the electorate in the democratic conversation." Robert Bennett, *Democracy as a Meaningful Conversation*, 14 CONST. COMM. 481, 501 (Winter 1997).

preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brown*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). Indeed, the Court has found a compelling government interest in preventing the erosion of public "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). Thus, preserving the integrity of the electoral process is a compelling government interest "basic to a democratic society." *United States v. UAW-CIA*, 352 U.S. 567, 570 (1957).

The time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Protecting the integrity of our system of representative democracy is a compelling government interest.[39] Because candidates and elected representatives are at the heart of

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[39] The Eighth Circuit, in upholding Minnesota's voluntary spending limits, favorably observed that the time protection rationale is "well settled" as a compelling government interest. *See Rosentiel v. Rodriguez*, 101 F.3d 1544, 1554 (8th Cir. 1996). The Eighth Circuit stated that "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Id.* at 1553. *See also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law because "such programs 'facilitate communication by candidates with the electorate,' [and] free candidates from the pressures of fundraising.")

the American republic, the government has a compelling interest in protecting their time.[40]

D. Vermont's Campaign Limits Directly Serve This Compelling Interest.

The record in this case demonstrates that Vermont's campaign expenditure limits directly serve a compelling government interest in protecting the integrity of our system of representative democracy. In enacting the law in question, the Vermont General Assembly specifically found that the demands of fundraising take excessive time away from the people's business. 1997 Vt. Laws P.A. 64 (H.28) (finding No. 1). After a full trial, the District Court agreed, finding that "the need to solicit money from large donors at times turns legislators away from their official duties." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). This was confirmed by the Second Circuit: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Landell v. Sorrell*, 382 F.3d 91, 121-22 (2d Cir. 2004). In sum, Vermont's campaign expenditure limits protect the time of candidates and elected officials, allowing them to redistribute their time as they see fit, to fully engage in the democratic process.

Moreover, Vermont's expenditure limits are the most narrowly tailored option to serve the compelling government

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[40] For a fuller discussion of the importance of campaigns in American democracy, *see* Alexander, *Let Them Do Their Jobs*, at 34-38; "Campaigns are conversations that educate candidates and empower the people through political dialogue, enhancing representative democracy." *Id.* at 34.

interest described above. Other campaign finance reforms, including those that have already been adopted and approved by this Court – individual contribution limits and public financing – do not adequately serve this interest.

Petitioners argue that individual contribution limits contributed to the fact that in order to meet the costs of running a successful campaign, candidates must spend countless hours raising money from individual donors. This raises the question whether individual contribution limits are a more appropriate response to the problem. However, in *Buckley* the Court acknowledged that individual contribution limits directly serve the compelling government interest in preventing corruption or the appearance thereof. 424 U.S. at 26. Moreover, as this Court observed in *Shrink*, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Nixon v. Shrink Mo. Gov't P.A.C.*, 528 U.S. 377, 395 (2000). Without individual contribution limits, the system would be even more vulnerable to corruption from those seeking access, power and influence.[41] Unlimited contributions are not the most narrowly tailored solution to the time protection problem.[42]

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[41] For further analysis of the numerous studies which document the fact that money can buy votes and change legislative outcomes, *see* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 U.MINN. J.L. & INEQUALITY 239 (2005).

[42] For further explication, *see* Alexander, *Let Them Do Their Jobs*, at 49-54.

Petitioners also suggest that Vermont could turn to public financing to address the time protection concern. VT Repubs Brief at 44. But that also represents a false alternative that does not well serve the compelling government interest. Its effectiveness is limited because public financing schemes are, under prevailing case law, voluntary. Public financing laws provide public funding to a candidate if she chooses to abide by a spending cap. But because these laws rely on voluntary compliance, multi-millionaire candidates and those with prodigious fundraising machines routinely opt out of public funding plans that will not match what private funds or fundraising will generate. As set forth above, the most recent presidential election provides a clear example of the weakness of public financing at the highest level of government. President George W. Bush and Sen. John F. Kerry rejected – with complete political justification – public financing in the primary election cycle, because they could easily raise much more with their own fundraising operations.[43] Instead, they spent their time raising money at the combined rate of a million dollars per day, thus dedicating more time to raising money and less to the business of the people and other campaign events. Thus the Achilles heel of public financing is that without mandatory limits on publicly-financed elections, all candidates remain free to spend unlimited amounts if they reject the public money. A voluntary system of public financing inherently fails to

[43] Governor Dean also opted out of the public financing of the 2004 presidential primaries. *See, e.g.*, http://www.opensecrets.org/presidential/index.asp.

serve the compelling government interest in time protection.[44]

The State of Vermont has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.[45] Other States and localities have taken related steps to enact meaningful campaign reform, efforts that *amici* have long admired.[46] To the extent that the States are laboratories of democracy,[47] *amici* submit that this Court should clarify that experimentation like that undertaken by the State of Vermont is not per se banned by *Buckley*.

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[44] For a fuller analysis of the shortcomings of voluntary public financing schemes, *see* Alexander, *Let Them Do Their Jobs* at 54-59.

[45] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, *Trends in Campaign Financing*, THE BOOK OF STATES, Vol. 35, at 275 (2003).

[46] *See, e.g.*, 142 Cong. Rec. S377 (daily ed. Jan. 25, 1996) (Statement of Sen. Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[47] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The limits adopted by the State of Vermont are narrowly tailored to serve a compelling government interest. Without spending limits, elected officials at all levels spend inordinate amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating, and meeting with constituents – and the quality of campaigns. Protecting the integrity of both elected office and of our system of representative democracy – both in the performance of elected officials and in the conduct of campaigns – is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should first, affirm the Second Circuit and hold that time protection is a compelling government interest, and second, uphold Vermont's common-sense regulations as narrowly tailored to serve this compelling government interest.

CONCLUSION

For the foregoing reasons, the Court should uphold the ruling of the United States Court of Appeals for the Second Circuit.

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IN THE

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NEIL RANDALL, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Petitioners*,

v.

WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, *Petitioners*,

v.

NEIL RANDALL, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld Vermont's contribution limits as constitutional under standards established by this Court, *e.g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and in light of legislative and district court findings to which deference is owed.

2. Whether this Court should decline to consider the constitutionality of Vermont's expenditure limits now, and instead affirm the court of appeals' remand order so that the lower courts may resolve open issues and thereby either pretermit the need for constitutional adjudication by this Court or provide a more complete record if such adjudication becomes necessary.

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INTEREST OF AMICI CURIAE[1]

Amici curiae, Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Martin Meehan, were the four principal sponsors of the Bipartisan Campaign Reform Act of 2002. Amici have devoted enormous time and energy to ensuring that our nation's campaign finance laws are effective.

The Court's review of Vermont's contribution and expenditure limitations may have repercussions for future legislative efforts, at both the federal and state levels, to limit the corrosive effects of money in the political process. For decades, legislators have depended on a consistent line of precedent from this Court that maintains the basic principles articulated in *Buckley* v. *Valeo*, 424 U.S. 1, 23 (1976), recognizes the critical government interest in maintaining the integrity of the electoral process and government offices, and shows appropriate deference to legislative judgments made in support of this interest. Amici respectfully urge the Court to uphold Vermont's contribution limits, consistent with its prior precedent, and to affirm the order by the court of appeals remanding the issue whether Vermont's expenditure limits are constitutional, thereby staying this Court's hand pending further development of the issue by the lower courts.

STATEMENT OF THE CASE

In 1997, the Vermont General Assembly held extensive legislative hearings to assess the need for campaign finance reform. After considering testimony from 145 witnesses, the General Assembly enacted Act 64, which established limits

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that the brief was prepared in its entirety by amici and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

on the amounts that candidates may accept as contributions and on the amounts that candidates may spend.

Act 64 establishes ceilings on the amounts candidates may accept from a single source. Vt. Stat. Ann. Tit. 17, § 2805(a)-(c). Candidates for statewide office may accept up to $400, state senate candidates may accept up to $300, and candidates for state representative or local office may accept up to $200.

Act 64 limits candidate expenditures based on the office sought. Candidates for governor may spend up to $300,000, candidates for lieutenant governor may spend up to $100,000, and candidates for other statewide offices may spend up to $45,000. Vt. Stat. Ann. Tit. 17, § 2805a(a)(1)-(3). Candidates for state representative and state senator may spend up to $2000 and $4000, respectively, with candidates in multi-seat districts permitted additional expenditures. *Id.* at § 2805a(a)(4)-(5).

Petitioners brought suit against, among others, Vermont's attorney general, arguing that Act 64 unconstitutionally infringes upon their First Amendment rights to free speech and association. The district court held a bench trial from May 8 to June 2, 2000, at which it heard extensive testimony from current and former Vermont office holders and expert witnesses. Among other things, the witnesses testified about the history of campaign finance practices in Vermont, the cost of elections, and how Act 64 might improve Vermont politics. The district court upheld the contribution limits but found the expenditure limits to be unconstitutional. Pet. App. 24a-25a.

Both petitioners and respondents appealed, with petitioners urging the court of appeals to overturn the contribution limits and respondents urging it to uphold the expenditure limits. The panel unanimously affirmed the district court's holding that the limits on contributions to candidates were constitutional, concluding that the "governmental interest in eliminating actual and apparent corruption is sufficient." Pet. App. 169a. The panel split on the expenditure question. The majority held that two interests proffered by

the state—prevention of corruption and the appearance thereof, and preservation of the time of candidates and elected officials—were potentially compelling enough to support the limits but that the district court's findings did not resolve whether Act 64's expenditure limits were narrowly tailored to serve those interests. The majority, accordingly, remanded the case to the district court to consider the issue of narrow tailoring. *Id.* at 91a. The dissenting judge, disagreeing that the state interests asserted to support the expenditure limits were compelling, would have affirmed the district court's decision striking down those limits. *Id.* at 194a. Rehearing en banc was denied, with four judges dissenting from that decision.

SUMMARY OF ARGUMENT

Vermont's contribution limits are constitutional under longstanding and consistent precedents of this Court. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court upheld a federal $1000 contribution limit. The Court concluded that contribution limits impose only a marginal restriction on speech and are thus subject to less exacting scrutiny than expenditure limits. The Court further concluded that both corruption and the appearance of corruption are constitutionally sufficient justifications to support contribution restrictions. *Id.* at 26. Within this basic framework, the Court has declined invitations to second-guess legislative judgments that establish particular contribution limits. *See, e.g., id.* at 30; *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 n.5 (2000); *California Med. Ass'n* v. *Federal Election Comm'n*, 453 U.S. 199, 201 (1981) (plurality opinion). This Court rightly refrains from "fine tun[ing]" the precise limits that legislatures adopt based on their experience and expertise and has explained that contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

Applying these well-established standards, the court of appeals correctly upheld Vermont's contribution limits. The

legislative and trial evidence overwhelmingly demonstrates that those limits are: (1) justified by Vermont's interest in avoiding actual and apparent corruption; (2) closely drawn to meet that indisputably important interest; and (3) ample enough to allow robust campaigning and debate in Vermont.

This Court should decline at this stage in the litigation to review the constitutionality of Vermont's expenditure limits and should reject the invitation to revisit its holding in *Buckley* concerning expenditure limits. The court of appeals neither sustained nor struck down Vermont's expenditure limits; instead, it remanded the case to the district court for further fact-finding and analysis regarding whether those limits are narrowly tailored. Those further proceedings may pretermit the need for this Court to engage in constitutional adjudication, which should not be embarked upon unnecessarily or prematurely. If the issue ultimately returns to this Court, the Court will have the considerable benefit of further lower court findings and analysis to inform its decision.

Buckley did not establish a *per se* constitutional bar on expenditure limits. Rather, it held that any such limit would need to meet the most exacting scrutiny. This Court should not reconsider that holding and should not assess its application to Act 64 before proceedings in the lower courts have concluded.

ARGUMENT

I. VERMONT'S CONTRIBUTION LIMITS ARE CONSTITUTIONAL UNDER THE STANDARDS ESTABLISHED IN *SHRINK MISSOURI* AND IN LIGHT OF THE DEFERENCE OWED TO THE LEGISLATIVE AND ADJUDICATIVE FINDINGS OF RECORD

A. This Court Has Consistently Sustained Contribution Limits And Has Deferred To The Line-Drawing Expertise Of Legislatures In Doing So

Buckley v. *Valeo*, 424 U.S. 1 (1976), established two principles that, for three decades, have guided constitutional review of state and federal campaign contribution limits. First, contribution restrictions entail "only a marginal restriction" on a contributor's ability to communicate and are therefore subject to less rigorous scrutiny than expenditure

restrictions. *Id.* at 20. Second, both corruption and the appearance of corruption are constitutionally sufficient governmental interests to support contribution restrictions. *Id.* at 26 (finding it "unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation").

Six years ago, in *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court applied these principles to Missouri's limits on the amounts candidates may receive in contributions. The Court found "no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern" state regulations and reaffirmed that contribution restrictions should receive more relaxed scrutiny than expenditure restrictions; that is, the challenged regulation need only be "'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 387-388 (quoting *Buckley*, 424 U.S. at 25), 397.[2] The Court recognized that *Buckley* had already found that the "'prevention of corruption and the appearance of corruption'" is a sufficiently important interest. *See id.* at 388 (quoting *Buckley*, 424 U.S. at 25-26).

The Court, consistent with prior cases, reaffirmed that where corruption or the appearance of corruption is identified as a basis for legislative reform, courts should be particularly reluctant to second-guess the legislature's finding.[3]

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[2] The Court clarified that, while it had applied that level of scrutiny in *Buckley* in the context of associational rights, it had "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." *Shrink Mo.*, 528 U.S. at 388.

[3] This deference was already well established. *See, e.g., Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (observing the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo.*, 528 U.S. at 391. Although "mere conjecture" will not suffice, *id.* at 392, the Court recognized that, even without the benefit of legislative history (which Missouri could not provide), "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.* at 395. Thus, the Court placed an evidentiary burden on challengers to meet even a minimal showing of a need for limits and to demonstrate that the legislature was mistaken. *See id.* at 394 (finding the plaintiffs had failed to make "any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here").

The Court in *Shrink Missouri* also established the principle that contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." 528 U.S. at 397.[4] Applying that principle to Missouri's contribution limits, the Court upheld a $1,075 contribution limit, concluding that, even considering approximately three-fold inflation, it was not "so different in kind" from the $1,000 limit sustained in *Buckley* as to warrant second-guessing the Missouri legislature's tailoring of the statute. *Id.* at 395. On remand, moreover, the Court of Appeals for the Eighth Circuit con-

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measures where corruption is the evil feared."); *California Med. Ass'n*, 453 U.S. at 199 & n.20 (sustaining the Federal Election Campaign Act's limit on contributions to multi-candidate political committees and recognizing the provision as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*," even if it was not the "least restrictive means of protecting the integrity of its legislative scheme") (plurality opinion).

[4] Similarly, in *Buckley*, the Court cautioned that "distinctions in degree become significant only when they can be said to amount to differences in kind." 424 U.S. at 30.

cluded, following "the teachings of the Supreme Court," that contribution limits for other state offices (which ranged from $275 to $1,075) were justified "in their entirety." *Shrink Mo. Gov't PAC* v. *Adams*, 204 F.3d 838, 840, 842 (8th Cir. 2000).

The importance of judicial deference to legislative judgments was most recently reaffirmed in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), where the Court, in upholding the major provisions of the Bipartisan Campaign Reform Act ("BCRA"), explicitly acknowledged that "the respect that the Legislative and Judicial Branches owe to one another" was important to its analysis. *Id.* at 137. Such deference is a common and critical thread in the Court's campaign finance jurisprudence. *See, e.g., Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 162 n.9 (2003) (deferring to congressional judgment concerning restrictions on corporate campaign contributions); *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-465 (2001) (rejecting the argument that a provision limiting coordinated expenditures by political parties could have been more closely tailored and observing that "Congress is entitled to its choice" between "limiting [parties'] contributions and limiting [their coordinated] expenditures"). Indeed, there is an important interplay between the Court's deference to legislative judgments in this area of the law and the reliance legislatures place on the Court's steady precedent in tailoring their legislative judgments. *See McConnell*, 540 U.S. at 137 (acknowledging the importance of "the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny").

B. Vermont's Contribution Limits Are Justified By An Important, Judicially Recognized State Interest

Vermont's justifications for the contribution limits it selected in Act 64 are the same as those this Court sustained in *Buckley* and *Shrink Missouri*. Although the amount of evidence that a court requires in support of an asserted state interest "will vary up or down with the novelty and plausi-

bility of the justifications raised," the particular interest in avoiding actual or apparent corruption arising from large contributions is "neither novel nor implausible." *Shrink Mo.*, 528 U.S. at 391. Accordingly, states generally need not engage in extensive fact-finding to establish their interest in curtailing the risk that contributions deemed to be large in the context of a particular state's political practices may give rise to actual or apparent corruption or the phenomenon of "politicians too compliant with the wishes of large contributors." *Id.* at 389.

In this case, the evidentiary basis for the law enacted by the Vermont General Assembly was ample. In the years leading up to the enactment of Act 64, public officials in Vermont frequently expressed concern regarding the corrosive effect of money in politics. In 1997, the Governor advised the Vermont General Assembly, based on his experience, that "money does buy access and we're kidding ourselves and Vermonters if we deny it." Ex. Vol. III at E-0902.[5] Politicians were not alone in recognizing the problems; the media reported extensively on campaign practices that aroused suspicion of improper influence exercised by donors of sums of money that were large in the context of Vermont politics. Ex. Vol. III at E-0746-E-0826. As the district court noted, "[s]uch barometers have been used by many other courts in evaluating the governmental interest that underpins contribution limits." Pet. App. 56a (citing

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[5] *See also* "Improving the Quality of Elections: Campaign Reform in the New Age of Shame: Return of the State Capitals" (speech by Vermont Secretary of State James Douglas, delivered Oct. 23, 1991), Ex. Vol. III at E-0911; Christopher Graff, *Money Changes Opinions*, Burlington Free Press, Apr. 27, 1997, Ex. Vol. III at E-0763 (quoting Senator Jeb Spaulding as stating that "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and passage or failure of bills around here"); Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, Rutland Herald, Apr. 8, 1997, Ex. Vol. III at E-0772 (quoting Senate President Pro Tem Peter Shumlin as stating that "[t]here's no question (money) buys access to the system .... In my view, it adversely influences a citizen Legislature and elections for that matter." (first alteration in original)).

Daggett v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000); *Adams*, 204 F.3d at 841-842).

Moreover, the General Assembly did its homework. Committees considering the Act conducted 65 hearings and heard more than 145 witnesses testify about, among other things, contribution patterns in Vermont's previous elections, the cost of campaigning, citizen polls concerning public perception of corruption, and whether particular donation amounts struck constituents as suspiciously large in the unique context of Vermont politics. Ex. Vol. I at E-0120-E-0186.

As the district court found, the evidence "overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics and that voter apathy is on the rise." Pet. App. 36a. The record further demonstrated "that large contributors often have an undue influence over the legislative agenda." *Id.* As to public perceptions of corruption, the district court pointed to a poll that determined that 74% of Vermont's voters felt that ordinary voters lacked influence over Vermont politics; the same poll found that 71% of voters thought that corporations had too much influence, and 70% thought that wealthy individuals had too much influence. Ex. Vol. III at E-0852.[6]

The record also includes the testimony of state legislators based on their extensive first-hand experiences in Vermont. Senator Cheryl Rivers testified that large donors often shape Vermont's legislative agenda and even determine whether a bill receives sufficient support from Senate leadership to move forward. Tr. VII-56-62. She also testified that the pressure to raise money makes it more difficult to pursue legislative initiatives contrary to the wishes of inter-

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[6] This Court and others have considered opinion polls to be appropriate measurements of public sentiment in assessing the validity of statutes like this one. *Shrink Mo.*, 528 U.S. at 394; *Daggett*, 205 F.3d at 457-458; *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 229 (D.D.C.), *aff'd in part, rev'd in part on other grounds*, 540 U.S. 93 (2003).

est groups that give large contributions. *Id.*[7] Senator Elizabeth Ready explained that the influence of campaign funding "starts at the beginning at election. The interests are involved in getting people elected. They may even be involved in recruiting candidates. They are involved all the way through, and they are very involved once you get to the legislative process within the statehouse." Tr. IX-87.[8]

Experts—both those of petitioners and respondents—agreed that large contributions at least appeared to affect legislators' voting behavior in Vermont. Professor Thomas Stratmann testified for the defendants that his empirical studies demonstrate that campaign contributions have a significant impact on legislative voting. Tr. VI-147 ("[W]hen legislators receive higher contributions, they are more likely to vote in the interests of the contributor."); *see also* Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, Ex. Vol. IV at E-1533. The district court noted that even plaintiffs' experts agreed that "[t]he more favors government has to give out, the more resources that people will spend to obtain those

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[7] Senator Rivers testified, moreover, that "it's like the arms race. If you want to be in leadership in the Vermont House or Senate, the main criteria appears to have become your ability to raise large amounts of money from some of the organizations that the lobbyists that you see at the statehouse every day represent." Tr. VII-56. She also admitted that "when I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent." Tr. VII-72. Former Congressman Peter Smith explained that when a bill is introduced, legislators typically ask "what's the industry position, what's the union position . . . what does the money want." Tr. VIII-25. Strikingly, Congressman Smith related that the National Rifle Association told him that if he reversed his position, "they would call off the dogs and they would make sure I got plenty of money and that I would be reelected." Tr. VIII-47.

[8] Although it may be inappropriate for this Court to defer to the legislature's determination whether contribution limits have the effect of "insulat[ing] legislators from effective electoral challenge," *Shrink Mo.*, 528 U.S. at 404 (Breyer, J., concurring), the district court in this case correctly concluded that the arguments that incumbents would be disproportionately affected by the contribution limits were "across the board . . . speculative" (Pet. App. 60a).

favors." Ex. Vol. VI at E-2202 (letter from Dr. John Lott); *see also* Pet. App. 38a.

Against this backdrop, there can be little doubt that the district court and the court of appeals correctly concluded that the legislative and adjudicative record supported Vermont's conclusion that contribution limits were needed to protect state politics from actual and apparent corruption. The evidence "clearly surpasse[d] the quantum of evidence offered and accepted as sufficient in *Shrink Missouri PAC* and would meet an even higher standard if one were applicable." *Daggett*, 205 F.3d at 458.

C. Vermont's Contribution Limits Are Closely Drawn

"[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (quotation omitted). The Court in *Shrink Missouri*, observing this, held that in determining whether to sustain particular contribution limits, courts give substantial deference to legislative judgments and should not attempt to "fine tune" the precise levels of the limits. 528 U.S. at 388.[9] Courts typically allow legislatures to "weigh competing constitutional interests in an area in which [they] enjoy[] particular expertise" and give them "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. Thus, contribution limits will be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

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[9] *See also State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 620 (Alaska 1999) (concluding that a legislature should determine appropriate contribution limits depending on the particular circumstances of the jurisdiction); *Daggett* v. *Webster*, 81 F. Supp. 2d 128, 139 (D. Me.), *aff'd following limited remand*, 205 F.3d 445 (1st Cir. 2000) ("If contribution limits are permissible, differences in their level from state to state should reflect democratic choices, not court decisions." (footnote omitted)).

As in *Buckley*, *Shrink Missouri*, and *McConnell*, ample record evidence here supports the court of appeals' holding that Vermont's contribution limits—in the unique context of Vermont—are closely drawn to meet that state's interests. Indeed, after holding extensive hearings, the Vermont legislature made the following specific findings:

> In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.
>
> In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.
>
> In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

1997 Vt. Laws Pub. Act 64, § 1(a)(3), (6), (7) (legislative findings).

The evidence presented at trial buttressed these legislative findings. The district court concluded that the limits did not have a severe impact on political dialogue based on evidence that: (1) during recent elections, less than 10% of the individual contributions exceeded the limits; and (2) the limits were high enough to permit effective campaigning in the recent Burlington mayoral election. Pet. App. 39a-41a.

The district court, for example, relied on the expert testimony of University of Vermont Professor Anthony Gierzynski. He considered the 1994, 1996, and 1998 elections and concluded that "it is clear that the contribution limits set by the legislature in 1997 would affect only a small percentage of contributors." Ex. Vol. III at E-0950. Approximately 90% of contributions to recent statewide candidates were under the limits set by Act 64, and more than 90% of contri-

butions were under the limits for state senate and house candidates. *Id.*

Professor Gierzynski opined, moreover, that "[t]he effect of the limits on senate and house candidates' revenues would be minimal." Ex. Vol. III at E-0954. Specifically, the percentages of revenue that would have been affected for state senate candidates were 10.1% in 1994, 10.8% in 1996, and 18.2% in 1998; the percentages of revenue affected in state house elections were 3.2% in 1994, 5.2% in 1996, and 6.5% in 1998. *Id.* As Professor Gierzynski explained, "[t]hese numbers suggest that the 1997 Act's limits would affect a small and replaceable part of senate and house candidates' revenues." *Id.*[10] Notably, Professor Gierzynski compared Vermont's contribution limits to those considered by the Court in *Shrink Missouri*. He concluded that "relative to the size of the constituency—and thus size of the campaign that is necessary—Vermont contribution limits (with the exception of the limit on Chittenden County senate candidates) are as generous or more generous than the Missouri limits recently upheld by the U.S. Supreme Court." *Id.* at E-0958.[11]

The district court also found that the evidence demonstrated that "[i]n the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state." Pet. App. 41a-42a. Even some of petitioners' witnesses agreed that contributions in

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[10] In the three elections considered, 89.6%, 82.6%, and 73.6% of the candidates for the Vermont House received *no* contributions over the $200 limit. Ex. Vol. III at E-0979. Approximately 40% of the Senate candidates during those years would have needed to make no adjustments. *Id.* In the 1994 and 1996 races, moreover, only 20% of the Senate candidates accepted more than three contributions that were over the $300 limit. *Id.*

[11] Because Chittenden County is a six-member senate district, the ratio of the contribution limit to the size of the constituency is somewhat different, which renders the contribution limits "slightly less generous." *Id.* at E-0954.

amounts greater than those Act 64 allowed were large in the context of Vermont. *See, e.g.*, Tr. II-201 (Patch). Having also considered the witnesses' near unanimous testimony that the limits set by the Vermont legislature allowed for meaningful contributions, *see, e.g.*, Tr. IV-101 (Summers); Tr. VII-80 (Rivers); Tr. IX-225 (Pollina), the court found that the contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public," Pet. App. 59a.

Also before the district court was testimony concerning whether candidates would be able to wage effective campaigns under new limits. Several candidates, campaign managers, and past officials testified that Act 64 would not prevent them from running effective campaigns. For example, Mark Snelling testified that even with Act 64's $400 contribution limit, a candidate for statewide office would be able to raise $300,000 to $400,000. Tr. I-40.[12] The district court also looked closely at the 1999 Burlington mayoral race, which at the time of trial was the only large election to have been held under the new limits. *Cf. Shrink Mo.*, 528 U.S. at 396 (examining campaigns that had been held under the contribution limits). The court concluded that mayoral candidates in the Burlington race remained able "to amass sufficient resources to run effective campaigns." Pet. App. 41a. This conclusion was well founded; bound by Act 64's limitation of $200 on contributions, the Burlington mayoral candidates in 1999 raised more than *five times* the amount raised by the candidates in the 1997 race. Ex. Vol. III at E-0957. This evidence also strongly indicates that the contribution limits will not unduly impair fundraising in competitive races, as petitioners suggest.

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[12] Former Secretary of State Don Hooper testified that "of course" he would be able to run an effective campaign under Act 64's contribution limits. Tr. V-23. Former Lieutenant Governor Peter Smith testified that the $300 and $400 contribution limits for statewide elections "absolutely" allow candidates to run effective campaigns. Tr. VIII-53.

Petitioners contend that there is no evidence that Vermont's prior contribution limits were insufficient.[13] But the evidence of actual or apparent corruption on which the legislature and district court relied occurred in the period during which the prior contribution limits were in force. Indeed, the Vermont General Assembly specifically found that "contributions larger than the amounts specified in this act are considered by the legislature, candidates and officials to be large contributions." 1997 Vt. Laws Pub. Act 64, § 1(a)(3). The record evidence demonstrates, moreover, that contributions in significantly lower amounts than the maximum permitted prior to Act 64 apparently led to lawmakers granting additional access to the contributors.[14]

A comparison to the facts of *Shrink Missouri* is instructive. In that case, the Court of Appeals for the Eighth Circuit concluded that Missouri's limits of $525 per election for Senate and $275 for House were constitutional. *Adams*, 204 F.3d at 842-843. As the district court in this case noted, Vermont's ratio of contribution limits to the size of constituency is quite close to that considered in Missouri: 0.00068 for Vermont compared to 0.00040 for Missouri. Pet. App. 58a. Constituency size is relevant to the analysis, for a candidate is not forbidden from soliciting contributions from other districts or other states, and yet the size of the candidate's constituency necessarily limits the number of voters that the candidate needs to reach. On that basis, Vermont's limits compare favorably with those upheld in Missouri.

The decision of the Court of Appeals for the First Circuit in *Daggett* is also instructive. There, the court of appeals examined a Maine law that limited campaign contributions to $250 for state representatives and state senators.

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[13] Prior to Act 64, candidates were limited to contributions from individuals of no more than $1,000 per election or $2,000 per cycle when a primary was held. 1988 Vt. Laws Pub. Act 263, § 3.

[14] For example, Senator Elizabeth Ready testified that when donors affiliated with the slate industry made $500 donations, they appeared to receive preferential treatment. Tr. IX-113.

Among other things, the court of appeals noted that the limit of $1,075 that the Supreme Court had upheld in *Shrink Missouri* applied in districts with more than 250,000 constituents, while the $250 limit at issue in *Daggett* applied in districts that averaged only 8,000 constituents. 205 F.3d at 459. After examining the campaign finance patterns in Maine and the typical costs of Maine campaigns, the court of appeals concluded that the $250 limit was constitutional. *Id.* at 459-461. *See also Montana Right to Life Ass'n* v. *Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (upholding Montana's statutory limits of $100-$400 on campaign contributions made by individuals).

In sum, the holding of the district court, based on an extensive legislative and trial record, that Vermont's limits are closely tailored to address the threat and appearance of corruption in Vermont politics should be affirmed.

II. THE COURT SHOULD NOT NOW ADDRESS THE CONSTITUTIONALITY OF VERMONT'S EXPENDITURE LIMITS, BUT SHOULD DEFER SO THAT THE LOWER COURT PROCEEDINGS ON REMAND MAY EITHER CLARIFY THE RECORD OR ALTOGETHER ELIMINATE THE NEED FOR CONSTITUTIONAL ADJUDICATION BY THIS COURT

It is premature for the Court to review the constitutionality of Vermont's expenditure limits because the lower courts have not conclusively decided the issue and there is no countervailing need for an expeditious resolution. A critical inquiry remains before the district court on remand, and prudence counsels against this Court's addressing a delicate constitutional issue at this time, when the lower courts have not finally decided the issue in the first instance, and when it may ultimately prove unnecessary for this Court to do so. In these circumstances, this Court should affirm the court of appeals' remand order. Should the Court conclude that it is appropriate to address the expenditure issue in some manner, it should, at most, clarify that *Buckley* did not purport to impose a *per se* ban on expenditure limits.

A. The Interlocutory Procedural Posture Of This Case Counsels Strongly Against A Premature Constitutional Ruling By This Court On The Expenditure Issue

The interlocutory status of this case counsels against premature review of the expenditure issue. The court of appeals did *not* dispose of the question whether Vermont's expenditure limits are constitutional. Although the court of appeals found that Vermont's need for expenditure limits was supported by certain state interests, Pet. App. 91a, it did not reach a conclusion as to the second, essential prong of its First Amendment analysis: whether the particular limits Vermont adopted were sufficiently narrowly tailored to meet constitutional dictates. Instead, the court remanded the case to the district court for consideration of that critical issue. Because the district court had found spending limits *per se* unconstitutional, it had not examined "whether the legislature might have chosen either another type of regulation besides mandatory spending limits" (*e.g.*, voluntary limits) "or higher limits, that would achieve the goals . . . and yet impinge less on the First Amendment rights of candidates and voters." *Id.* at 164a.[15]

This Court's usual practice is to avoid deciding a case on the merits where the court below has not finally resolved the issue. "This reluctance is justified not only in the obvious cases in which lower court rulings have forestalled development of a trial record, but also in cases in which the Court has simply lost the advantage of prior appellate scrutiny of

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[15] The court of appeals correctly articulated the three-part test for determining whether the limits were narrowly tailored: "(1) the extent to which the State's interests are advanced by the regulation; (2) the extent to which candidates can conduct 'effective advocacy' under the limits; and (3) whether the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights." Pet. App. 148a. Applying this test to Vermont's expenditure limits, the court of appeals concluded that the first two prongs of the test were satisfied but remanded to the district court for further consideration of the third prong. *Id.* at 164a.

the record and deliberation of the arguments." 17 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4036, at 38-39 (1988). *See also National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ([W]e do not decide in the first instance issues not decided below."); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975), *overruled in part on other grounds by Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) ("[B]ecause the District Court did not discuss [whether there was a procedural due process violation], and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance."). The Court recently practiced just this sort of caution in *Wisconsin Right to Life, Inc.* v. *Federal Election Commission*, No. 04-1581, 2006 WL 152676 (U.S. Jan. 23, 2006) (per curiam). There, the petitioner had brought an as-applied challenge to BCRA's electioneering communications provisions, which the district court dismissed based on its view that *McConnell* categorically foreclosed any such challenges. After rejecting that reading of *McConnell* and concluding that it was unclear whether the district court had also suggested that the particular ads at issue "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," the Court declined to reach the merits and remanded for further review. *Id.* at *1 (quotation omitted).[16]

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[16] The Court has not hesitated to deny a petition for writ of certiorari in such circumstances or, if necessary, dismiss a petition as improvidently granted. *See Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (explaining, in context of remand by court of appeals, that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); James Wm. Moore, 22 *Moore's Federal Practice* § 405.03[2][a][ii][A] (3d ld. 2005) (explaining that, although absolute finality is not required, "[t]he Court does not ordinarily grant certiorari . . . especially if further proceedings might affect the issue on which certiorari is sought"); *Wainwright* v. *City of New Orleans*, 392 U.S. 598, 598 (1968) (Harlan, J., concurring) (dismissing writ and describing record as "too opaque" to permit resolution of federal issue).

Here, there are sound reasons to permit the lower courts to further address the expenditure limit. First, the district court needs to consider whether Vermont's spending limits are the least restrictive means of furthering the state's asserted interests, *i.e.*, whether no other type of regulation could have advanced the state's interests while impinging less on First Amendment rights. In this connection, it may be relevant that the record shows that when Act 64 was originally introduced in the House, it contained a provision—not unlike the federal law sustained in *Buckley*—that provided for voluntary public financing of election campaigns tied to a candidate's acceptance of voluntary spending limits. Pet. App. 159a-160a. Notably, the record shows that the proposed voluntary spending limits appear to have been made mandatory in one of the House committees, but "[i]t is unclear from the current record why this change occurred, and the [d]istrict [c]ourt made no findings on this point." *Id.*

Second, even if the district court were to conclude that only mandatory spending limits could advance the state interests at issue, it must still consider why the particular amounts the Vermont legislature chose were preferred over higher amounts. Pet. App. 161a. The limits Vermont chose differed from those in the original Senate and House bills, and the record does not definitively indicate the basis on which the Vermont legislature selected the final amounts. *Id.* at 161a-162a.

As the court of appeals recognized, these unanswered questions bear on judicial review of the legislature's judgment. Pet. App. 166a ("Indeed, even a modicum of deference to the legislature and consideration for principles of federalism would seem to require consideration of its reasons for rejecting a potentially less-restrictive alternative scheme.").

Independent of this need for the district court to address fully the least restrictive means prong is the uncertainty of the result on remand. On remand, the district court or the court of appeals could decide that a voluntary spending limit, for example, is a less restrictive means, potentially

rendering further review of petitioners' claim by this Court unnecessary.

B. The Court Should Not Opine On A Delicate Constitutional Question That May Be Unnecessary To Decide This Case

The importance of the constitutional issues at stake, particularly in the context of reviewing a state statute, provides further reason to exercise judicial restraint. This Court has long followed the doctrine, grounded in the "basic principles regarding the institution of judicial review and this Court's proper role in our federal system," *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14-15 (1993) (Blackmun, J. dissenting, joined by Souter, Stevens, and O'Connor, JJ.), that it "'ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'" *id.* at 14 (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). *See also Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nor will the Court "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quotation omitted).[17]

The Court has applied this "cardinal" rule in First Amendment cases. *See, e.g., Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) ("Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it."). This practice reflects the Court's understanding that it

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[17] *Cf. Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960) (remanding case to lower court for determination of two non-constitutional questions based on the "settled canons of constitutional adjudication [dictating that] the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled").

should not invoke its extraordinary authority to pass on the constitutionality of a law when other means are available for deciding the case. *See Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (*per curiam*) (holding, under the avoidance principle, that where both a procedural and constitutional question must be answered to determine the appealability of a habeas petition, the former should be decided first); *Petite* v. *United States*, 361 U.S. 529, 531 (1960) (noting the "settled rule that the Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" (citation omitted)).

Should Vermont's expenditure limits survive a full review in the lower courts, there may well be reason for this Court to address constitutional limits on spending caps. Now is not that time. Although some would push the Court to reexamine *Buckley*—and to do so as soon as possible—doing so now would neither serve the orderly resolution of this case nor the broader institutional interests in constitutional adjudication that are at stake.

C. At Most, The Court Should Affirm The Court Of Appeals' Holding That *Buckley* Did Not Foreclose Expenditure Limits In All Circumstances

Should the Court offer guidance to the lower courts in connection with the remand, it should not go beyond the narrow question whether *Buckley* purported to ban all expenditure limits. The court of appeals, in remanding the case, correctly observed that *Buckley* "did not rule campaign expenditure limits to be per se unconstitutional," and that "narrowly tailored spending limits that secure clearly identified and appropriately documented compelling government interests" might conceivably pass muster under *Buckley*. Pet. App. 95a. This Court could affirm that narrow observation without breaking new constitutional ground.

Although *Buckley* recognized that the standard for sustaining an expenditure limit, like that at issue here, is a high one, the Court did not categorically reject any legislative effort to meet this heavy burden under any factual circumstances. The *Buckley* Court observed that Congress had

imposed the expenditure limitations contained in the Federal Election Campaign Act ("FECA") with the aim of protecting certain interests. 424 U.S. at 56-57. The Court rejected those interests as insufficient to justify the expenditure limits at issue on the record before it and thus struck them down. *Id.* In so doing, however, the Court was careful not to hold that expenditure restrictions were *per se* invalid.

In rejecting the necessity of FECA's expenditure limits to combat corruption, the *Buckley* Court tied its reasoning to the record before it, which demonstrated that the Act's contribution and disclosure limits already combated the "major evil" associated with large campaign expenditures: reliance on large contributions. 424 U.S. at 55. Similarly, the Court's rejection of the assertion that the expenditure limits were necessary to reduce the incentive to circumvent the contribution limits was based on its conclusion that "[t]here [was] *no indication* that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations [would] be insufficient to police the contribution provisions." *Id.* at 56 (emphasis added).

Thus, *Buckley* left open the possibility that legislatures might identify, under different factual circumstances, compelling interests that could justify campaign spending limits, provided the measures were narrowly tailored. Indeed, this Court has never embraced a categorical rule that a particular form of regulation of speech (or funding of speech) is unconstitutional—no matter how compelling the governmental interest at stake and no matter how narrowly tailored the rule. Consistent with this Court's overall approach to the First Amendment, *Buckley* did not adopt a wooden, *per se* approach and, instead, focused on the particular circumstances presented in that case.

CONCLUSION

The Court should affirm the court of appeals in upholding Vermont's contribution limits and affirm the court of appeals order remanding the expenditure issue pending full resolution by the lower courts.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NEIL RANDALL *et al.*,
Petitioners/Cross-Respondents,

v.

WILLIAM H. SORRELL *et al.*,
Respondents/Cross-Petitioners.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Vermont's limits on candidate expenditures and campaign contributions are unconstitutional infringements on essential First Amendment freedoms.

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the First Amendment prohibits Vermont from placing severe restrictions on candidate expenditures and campaign contributions. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an official elected to federal office with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, *"Reform" Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the 1997 Vermont Campaign Finance Reform Act.

STATEMENT

1. All campaign finance restrictions are constitutionally suspect, because political speech is at the heart of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the government's generalized interest in removing corruption and the appearance of corruption from politics can support restrictions on campaign *contributions*, but is insufficient to justify limitations on candidate *expenditures*. *Id.* at 55. As the Second Circuit recognized, Vermont lawmakers passed the 1997 Vermont Campaign Finance Reform Act ("Act 64"), Vt. Stat. Ann. tit. 17, §§ 2801-2883, with the specific intention of

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right To Life, Inc. v. FEC (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 614 (1996) (No. 95-489).

"provok[ing] a test case to overrule *Buckley* with regard to expenditure limits." Pet. App. 201a.

Act 64 includes restrictions on speech that extend well beyond what *Buckley* sanctioned. The Act limits all candidate expenditures during a two-year election cycle. Vt. Stat. Ann. tit. 17, § 2805a. The spending limits vary from $2,000 for a state representative in a single-member district to $300,000 for governor. *Id.* Incumbent spending is limited to 85-90% of these limits depending upon the office sought. *Id.* § 2805a(c). The Act defines candidate "expenditures" broadly to include "anything of value[] paid . . . for the purpose of influencing an election [or] advancing a position on a public question," *id.* § 2801(3), which even encompasses the use of a candidate's own car and telephone, and also money spent complying with the Act. Pet. App. 225a-226a, 229a-232a, 241a-242a. A candidate cannot avoid the Act's spending limits by resorting to personal funds: The Act applies equally to candidates who finance their campaigns with political contributions and to those who rely exclusively upon their own funds. Vt. Stat. Ann. tit. 17, § 2805a(a).

Act 64 considers an expenditure by any noncandidate to be "related"—and therefore attributable to a candidate's expenditure limit—where it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by, or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The Act creates a rebuttable presumption that expenditures made by a political party or PAC are "related" if they primarily benefit six or fewer candidates. *Id.* § 2809(d). The cost of rebutting the presumption is assessed against the candidate's expenditure limit, even if the candidate prevails. Pet. App. 225a-226a.

Act 64 also sharply restricts contributions to candidates from a single source, a political party, or a PAC, with limits

ranging from $200 to $400 depending upon the office sought. Vt. Stat. Ann. tit. 17, § 2805. Because Act 64's expenditure and contribution limits apply on the basis of a two-year election cycle, the limits encompass expenditures and contributions for *both* a primary and general election. *Id.* §§ 2805, 2805a. These consolidated limits apply even where a candidate has a contested primary but his general election opponent does not. *Id.*

2. This case arises from three lawsuits challenging Act 64's constitutionality. Pet. App. 24a. The plaintiffs include a sitting Vermont state legislator, individuals who plan to seek Vermont political office, political parties and PACs, individual campaign contributors, and members of the Vermont electorate. Pet. App. 50a-51a. After a ten-day bench trial in 2000, the district court upheld many of the Act's challenged provisions, but enjoined enforcement of the expenditure limits as well as the limits on contributions from political parties. Pet. App. 24a-26a.

The district court's decision was appealed by all parties to the Second Circuit, which in August 2002 issued a 2-1 opinion sustaining almost all of Act 64's challenged provisions, including its expenditure limits. Pet. App. 95a. The court subsequently withdrew its opinion and then issued another 2-1 decision that again upheld most of the challenged provisions, while remanding the case for the district court to determine whether Act 64's expenditure limits are narrowly tailored. Pet. App. 96a-97a.

Although Vermont asserted five governmental interests in support of Act 64's expenditure limits, the Second Circuit considered only the first two: Vermont's purported interests in "avoiding the reality and appearance of corruption in elective politics and government" ("the anticorruption interest") and in "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties" ("the time-protection

interest"). Pet. App. 145a.[3] Contending that "the *perception* of corruption was an important part" of the anticorruption interest, Pet. App. 128a (emphasis in original), the court concluded that "Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending." Pet. App. 135a. The court nevertheless acknowledged this anticorruption interest was insufficient to sustain Act 64's expenditure limits because *Buckley* had "reject[ed] the anticorruption interest" in this regard. *Id.* The Second Circuit therefore expanded its inquiry to consider Vermont's time-protection interest. Noting that the "*Buckley* Court . . . alluded to this time-protection interest only in passing," Pet. App. 137a, the court deemed the time-protection interest to be compelling because "the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." The court opined that, "without spending limits, the contribution limits would exacerbate the time problem." Pet. App. 143a.

Notwithstanding *Buckley*'s invalidation of expenditure limits, the Second Circuit concluded that when the anticorruption and time-protection interests are "considered in tandem," they are "sufficiently compelling to support [Ver-

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[3] The five interests put forward by Vermont were:

(1) "avoiding the reality and appearance of corruption in elective politics and government";

(2) "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties";

(3) promoting "electoral competition" and "protecting equal access to political participation";

(4) "bolster[ing] voter interest and engagement in elective politics";

(5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Pet. App. 127a.

mont's] expenditure limits." Pet. App. 144a, 145a. Because the record was inadequate to determine whether the expenditure limits are narrowly tailored, however, the Second Circuit instructed the district court on remand to resolve "whether the legislature might have chosen . . . another type of regulation . . . that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters." Pet. App. 164a.

Turning to Act 64's contribution limits, the court concluded that these restrictions are compatible with the First Amendment because they are "closely drawn" to the anticorruption interest and comparable to "similar limits upheld in Maine and Missouri." Pet. App. 169a-170a. The court also upheld the constitutionality of Vermont's related expenditures provision, rejecting the argument that the provision is impermissibly vague and unduly restrictive of political parties' and PACs' activities. Pet. App. 181a-182a.

Judge Winter dissented from the panel majority's holding that Act 64's expenditure limits serve a compelling governmental interest and that the Act's restrictions on political parties are constitutional. Pet. App. 190a (Winter, J., dissenting). Emphasizing that "great caution is in order where incumbent legislators pass laws affecting their electoral fate," he was troubled by the panel majority's excessive deference to the Vermont legislature, which "exceed[ed] even that accorded to decisions of an administrative body." Pet. App. 206a-207a.

Judge Winter perceived that Act 64 "limits or prohibits a vast range of ordinary political activities," Pet. App. 191a, and identified the Act's adverse impact on grass-roots political activity (Pet. App. 228a), candidate speech (Pet. App. 233a), challengers (Pet. App. 245a), the press (Pet. App. 250a), and party affiliates (Pet. App. 253a). He further recognized that *Buckley* had conclusively foreclosed the use of the anticorruption interest to support expenditure limits, and

offered specific evidence from the *Buckley* record to demonstrate that the time-protection issue was also "fully before the Court in *Buckley*" and therefore had been rejected as a basis for imposing expenditure limits. Pet. App. 258a, 265a. Finally, Judge Winter objected to the narrow-tailoring remand because "vastly less restrictive alternatives"—including a system of combined public and private campaign funding—"are so obvious that a remand is unnecessary." Pet. App. 292a, 300a.

Plaintiffs petitioned for rehearing en banc, which the Second Circuit denied. *See Landell v. Sorrell*, 406 F.3d 159, 160 (2d Cir. 2005). The denial prompted four separate dissenting opinions, which were joined by a total of five judges. *Id.*[4] Three concurrences in the denial of rehearing en banc were also filed. *Id.* Notably, three of the seven judges concurring in the denial acknowledged that Act 64 is in tension with this Court's existing campaign finance precedent. *See id.* at 165, 167 (Sack and Katzmann, JJ., concurring in the denial of rehearing en banc); *id.* at 164 (Calabresi, J., concurring in the denial of rehearing en banc). Indeed, Judge Calabresi candidly acknowledged a desire to encourage this Court to revisit its holding in *Buckley* that an interest in equalizing electoral spending is not a sufficient basis for expenditure limits. *See id.* at 162, 165 (Calabresi, J., concurring in the denial of rehearing en banc) ("*Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. . . . I believe . . . a reconsideration [of *Buckley*] to be essential.").

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[4] Because Petitioners' Appendix was produced before the final amended version of the order denying rehearing en banc was filed, it does not contain Judge Calabresi's opinion concurring in the denial of rehearing or Judge Raggi's opinion dissenting from the denial. Pet. App. 317a.

SUMMARY OF ARGUMENT

Free speech is the essence of self-government, and thus all restrictions on political speech must be subject to searching judicial scrutiny. Act 64's expenditure and contribution limits silence the speech of both voters and candidates, and therefore cannot be reconciled with *Buckley* or with the First Amendment principles on which that decision rests.

The Second Circuit's conclusion that the anticorruption and time-protection interests taken together are sufficient to support Act 64's expenditure limits flatly contradicts *Buckley*'s holding. Indeed, Vermont's alleged time-protection problem is caused by its exceedingly low contribution limits, which require candidates to approach numerous small donors to raise essential campaign funds. Because Vermont's campaign finance restrictions have generated its perceived time-protection problem, the State cannot rely upon its interest in remedying that problem to justify its expenditures limits. Moreover, as in *Buckley*, Act 64's contribution limits and disclosure provisions more than fully address any legitimate anticorruption interest Vermont may have.

In upholding Act 64's expenditure limits, the Second Circuit *sub silentio* broadened the anticorruption interest to encompass the "equalization" rationale explicitly rejected in *Buckley*. This Court should reaffirm this aspect of *Buckley* because the compelled equalization of political speech is inconsistent with the First Amendment's fundamental commitment to free and robust debate on public issues. Whereas the First Amendment promotes a competitive and uninhibited marketplace of political ideas, Act 64 subordinates this principle in favor of a vague effort to equalize the quantity of political speech among various groups.

Furthermore, Vermont's campaign finance laws embody incumbent self-protection. Act 64 cannot withstand close judicial scrutiny because it accomplishes very little of what it claims and has the principal effect of benefiting incumbents.

For example, contrary to Vermont's assumption that Act 64's contribution limits reduce the access and influence of large donors, the Act actually has the opposite effect. The most efficient way to raise funds under the Act is for candidates to pursue only those donors willing to give the maximum authorized contribution, and thus to quickly reach the low expenditure limits, which marginalizes the majority of Vermont contributors.

Ultimately, Act 64's expenditure limits, contribution limits, and related-expenditure provision are incompatible with the fundamental political freedoms guaranteed by the First Amendment, and should be invalidated in their entirety.

ARGUMENT

I. ACT 64 IS BARRED BY THIS COURT'S HOLDING IN *BUCKLEY*.

The First Amendment embodies this Court's "profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Nowhere is this commitment stronger than in the realm of political speech, which constitutes "the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *Buckley* therefore cautioned that it "is wholly foreign to the First Amendment" to "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. Act 64's expenditure and contribution limits are squarely barred by *Buckley*'s admonition.

A. Act 64 Is Premised Upon Inappropriate Governmental Interests.

1. In *Buckley*, this Court considered a First Amendment challenge to provisions of the Federal Election Campaign Act ("FECA") that imposed unprecedented limitations on political contributions and expenditures. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). FECA prohibited individual campaign con-

tributions in excess of $1,000 per candidate and $25,000 overall, barred individuals from independently spending more than $1,000 on behalf of a candidate, and restricted the total amount a candidate could spend in primary and general election campaigns. *Buckley*, 424 U.S. at 7.

The United States asserted three governmental interests in support of FECA's campaign restrictions. *Buckley*, 424 U.S. at 25. The "primary interest" was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* The Court termed the other two interests "'ancillary' interests." *Id.* The first of these interests was "equalizing the relative ability of all citizens to affect the outcome of elections" by "mut[ing] the voices of affluent persons and groups in the election process." *Id.* at 25-26. The second was to "open the political system more widely to candidates without access to sources of large amounts of money" by curtailing the supposed "skyrocketing cost of political campaigns." *Id.* at 26.

The *Buckley* Court closely scrutinized FECA's campaign finance restrictions because the "governmental interests advanced in support of the Act involve[d] 'suppressing communication'" by "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Although the Court upheld FECA's $1,000 limitation on campaign contributions by individuals, it was careful to explain that it was not "address[ing] the more serious argument that these [contribution] limitations, in combination with the limitation on expenditures ... invidiously discriminate against major-party challengers and minor-party candidates." *Id.* at 31 n.33. The Court expressed concern that "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge." *Id.* The Court further warned that "contribution restrictions could have a severe impact on political dialogue if

the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Turning to FECA's expenditure limits, the Court noted that such restrictions "impose direct and substantial restraints on the quantity of political speech" and "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 39, 44. The Court determined that the anticorruption interest was "inadequate" to justify the Act's $1,000 limitation on independent campaign expenditures because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 45-46. The Court then considered whether the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" supported the $1,000 expenditure limit. *Id.* at 48. The Court squarely rejected this "equalization" rationale and emphasized that "*the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.*" *Id.* at 48-49 (emphasis added). The Court therefore concluded that FECA's $1,000 independent campaign expenditures limitation violated the First Amendment. *Id.* at 51.

The Court also invalidated FECA's limitations on candidates' overall campaign expenditures. The Court explained that the anticorruption interest was already "served by . . . contribution limitations and disclosure provisions" and that "[i]n the free society ordained by our Constitution it is not the government but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 55, 57 (footnote omitted).

In the thirty years since *Buckley* was decided, this Court has held fast to the essential core of its holding, consistently evaluating campaign finance laws solely by their congruence with the government's anticorruption interest. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" (emphasis added)).

2. The Second Circuit relied upon Vermont's asserted anticorruption and time-protection interests to sustain Act 64's expenditure limitations. Pet. App. 144a. Analyzed in accordance with *Buckley*, however, the Second Circuit's attempt to bolster the anticorruption interest with Vermont's asserted time-protection interest collapses.

Vermont's time-protection interest is nothing more than a byproduct of its anticorruption interest. Indeed, if Vermont candidates do spend more than optimal amounts of time fundraising, then it is Act 64's low contribution limits that are to blame. Pet. App. 143a. In the absence of such stringent restrictions, candidates could raise necessary funds from a smaller number of donors. Because Vermont's purported time-protection problem is attributable to the contribution limits enacted in response to the State's anticorruption concerns, the time-protection interest cannot serve as an independent justification for restricting political speech.[5]

It defies logic and common sense to permit *Buckley*'s rejection of the anticorruption interest as a sufficient basis for expenditure limits to be circumvented through such legal

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[5] Instead of justifying even more speech restrictions, a time-protection problem actually indicates that contribution limits are set at unconstitutionally low levels. *See McConnell*, 540 U.S. at 135 (warning that contribution limits could be "so low as to 'preven[t] candidates . . . from amassing the resources necessary for effective advocacy'" (quoting *Buckley*, 424 U.S. at 21 (brackets in original))).

bootstrapping. *See* Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself out of a swamp by his own hair."). Vermont should not be permitted to rely upon its anticorruption interest to manufacture multiple derivative interests that, when aggregated, are ostensibly capable of supporting expenditure limits. *See* Pet. App. 336a (Jacobs, J., dissenting) ("[T]he more-restrictive expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the less-restrictive contribution limits. . . . Strict scrutiny does not tolerate such bootstrapping." (emphases omitted)).[6]

Moreover, to the extent that Act 64 actually reduces the time that candidates spend fundraising, it restricts constituents' access to their elected officials by limiting voters' opportunities to interact with candidates at fundraising events. Vermont's efforts to conserve candidates' time therefore constitute an impediment to voters' ability to meet and communicate with their elected officials.

B. The Court Should Reaffirm *Buckley*'s Rejection Of The "Equalization" Interest.

Act 64's expenditure and contribution limits make little sense when viewed as merely an attempt to prevent corruption or to conserve candidates' time. Indeed, these were not the only interests that the Act was designed to promote. The

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[6] As in *Buckley*, Vermont's anticorruption interest is more than sufficiently addressed by reasonable contribution limits combined with strict disclosure laws. *See* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [the Act's] campaign expenditure ceilings."). Indeed, Vermont presented "no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence." Pet. App. 266a (Winter, J., dissenting).

Second Circuit recognized that when drafting Act 64, "Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much campaign finance reform." Pet. App. 94a. In contravention of *Buckley*, Vermont lawmakers also sought to compel the equalization of political speech. *See, e.g.*, Pet. App. 130a (asserting that "[l]arge contributions and large expenditures . . . reduce public confidence in the electoral process" (quoting 1997 Vt. Laws P.A. 64 (H. 28) (finding No. 9))). Indeed, Vermont explicitly argued below that Act 64 "protect[s] equal access to political participation." Pet. App. 127a.

In upholding Act 64, the Second Circuit evaded *Buckley*'s rejection of the equalization rationale by *sub silentio* broadening the anticorruption interest to subsume the notion of equalization. *See, e.g.*, Pet. App. 133a (considering testimony that "not every voter has the financial ability to participate" as evidence of corruption). As Judge Winter correctly recognized, both Act 64 and the Second Circuit's opinion sustaining it are premised upon the theory "that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups." Pet. App. 279a (Winter, J., dissenting). This governmental interest in "equalizing" political speech through controlling campaign costs and restricting candidates' financial resources is a rationale that *Buckley* expressly considered and rejected.

Cutting away at the edges of *Buckley*'s equalization holding, under the guise of preventing "corruption," muddles the Court's constitutional jurisprudence and "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 U.S. at 425 (citation omitted); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Buckley's holding is a fundamental reflection of our "profound national commitment to the principle" that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the "right of freely examining public characters and measures, and of free communication among the people thereon, [is] the only effectual guardian of every other right." James Madison, Report on the Virginia Resolutions (1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 146 (Philip B. Kurland & Ralph Lerner eds., 1987).

Vermont's expenditure limits operate on the assumption that "too much" political speech undermines citizen confidence in the government. The First Amendment, however, embodies the opposite premise. As Justice Breyer has recently explained:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 42 (2005). This principle has dominated our nation's understanding of political speech since its founding. *See* Madison, *supra*, at 145 ("The value and efficacy of [voting] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

Because political speech rests at the First Amendment's core, the government cannot forcibly equalize political speech by suppressing one group's speech in favor of another's. As this Court recognized in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution *it is not the government but the people . . . who must retain control over the quantity and range of debate* on public issues in a political campaign.

424 U.S. at 57 (emphasis added; footnote omitted).

The "equalization" rationale upon which Act 64 was premised undermines the protection historically afforded to political speech and cannot be reconciled with the First Amendment's role as guardian of the political marketplace. *See Buckley*, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."). Indeed, the First Amendment assumes a competitive marketplace of political ideas where "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Moreover, when the role of money is reduced, media access, fame or notoriety, and the advantages inherent in incumbency become even more dominant factors in deciding elections. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1078 (1996) ("attempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary, sources"). In fact, money often permits a challenger to overcome an incumbent's inherent advan-

tages. *See Buckley*, 424 U.S. at 56-57 ("the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign"). With expenditure limits in place, the already well-known, who can rely upon their preexisting name recognition, are often the only candidates able to mount an effective challenge to an incumbent. As Governor Schwarzenegger's electoral success in California suggests, publicly recognizable candidates may frequently enjoy a significant advantage over their opponents. When expenditure limits are implemented, the name recognition of challengers who are widely known to the electorate as war heroes, Hollywood movie stars, or superstar athletes gains even greater significance.

Similarly, by creating a system in which "free" media would be of potentially disproportionate significance, Vermont would ensure that free media's favored candidates have an unfair advantage. Vermont would bar a candidate from buying media access to counteract the unlimited sums that media corporations can spend to promote their favored candidate. *See* Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14 (observing that "one page of speech in USA Today could cost a private citizen, group, or candidate about $100,000").

Recognizing compelled equalization of political speech as an interest that trumps the First Amendment's protections opens the door to speech regulation that logically extends well beyond expenditure limits. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13. This may not disturb some advocates of campaign finance reform; one of Vermont's defense witnesses testified at trial that the "government ought to regulate political speech the way that it regulates public utilities." Pet. App. 195a (Winter, J., dissenting). Indeed, if the "equalization" rationale is to be effectuated, the government *must* regulate politi-

cal speech the way that it regulates public utilities. Equalization of political speech can only be achieved—to the extent that it can be achieved at all—through extensive regulation and direct governmental interference clearly inconsonant with the core principles underlying the First Amendment. This Court should therefore invalidate Vermont's effort to use expenditure and contribution limits to compel the equalization of political speech.

II. ACT 64 IS AN UNCONSTITUTIONAL IMPEDIMENT TO THE ELECTORAL PROCESS.

Because campaign finance restrictions present a unique potential for incumbent entrenchment, "considerable judicial suspicion" of such laws is appropriate. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994). Act 64's primary effect is to insulate incumbents from effective electoral challenges, and it therefore cannot withstand judicial scrutiny.

A. Act 64's Contribution And Expenditure Limits Entrench Incumbents.

1. Incumbents have a direct, personal stake in the election laws that they enact. *See* Sunstein, *supra*, at 1400 ("Any system of campaign finance limits raises the special spectre of governmental efforts to promote the interests of existing legislators."). It is difficult to conceive of any other area of law where the self-interest of all legislators, regardless of their party affiliation, is so uniformly aligned and so inconsistent with their constituents' interests. *See id.* ("Congressional support for [campaign finance] limits is especially likely to reflect congressional self-dealing. . . . Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks.").

Recognizing this, courts closely review campaign finance legislation to ensure that First Amendment principles

are not being subordinated to legislators' own interests. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (noting that the Court "defers to empirical legislative judgments" only where "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). This is especially true when legislators justify such laws on the basis of "equalizing" political speech; such a rationale is simply too far-reaching and amorphous to provide any meaningful restraint on naturally self-interested legislators. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994) ("[S]imply turning Congress loose to promote 'equality,' without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result."). As Justice Breyer has explained:

> [C]ourts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.

BREYER, *supra*, at 49.

The risk of incumbent self-dealing reinforces the importance of subjecting expenditure limits to the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. The Second Circuit, however, reviewed Act 64 with unwarranted deference, contending that the "review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the

reforms they are enacting." Pet. App. 151a; *see also* Pet. App. 207a (Winter, J., dissenting) ("I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny.").

2. Even assuming, *arguendo*, that Act 64's stated objectives are constitutionally legitimate, the Act does not accomplish its purported ends. Its expenditure limits, for example, do not further Vermont's anticorruption interest. *See Buckley*, 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). Nor does Act 64 ameliorate the time-protection problem it purports to address. Indeed, even the district court acknowledged as much. *See* Pet. App. 57a (noting that as a consequence of Act 64's low contribution limits, fundraising "will take more time and energy"). Similarly, Act 64's contribution limits are too low to correspond to any threat of actual or apparent corruption.

Act 64 is particularly effective, however, at promoting incumbency protection. This was obvious to the judges who dissented from the denial of rehearing en banc because they did not view Act 64 through the panel majority's deferential lens. Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Vermont's expenditure limits (and in my view, its contribution limits) are set so low and in such a fashion that *only* a desire to protect incumbents can explain them." (emphasis added)); Pet. App. 336a (Jacobs, J., dissenting from the denial of rehearing en banc) ("the dominant but impermissible effect of the Act is to protect incumbents").

Incumbents naturally possess formidable advantages over challengers. *See* Smith, *supra*, at 1075 n.158 ("Incumbency is already the single best predictor of electoral success."). As this Court noted in *Buckley*, "it is axiomatic that an incumbent usually begins the race with significant advantages." 424 U.S. at 31 n.33. If expenditures by challengers

can be limited to a level roughly equivalent to the average spent by all candidates, the advantages of incumbency become practically insurmountable. This is illustrated by the average amounts spent by winning candidates for national Congressional office in 2000 and 2002:

Average Spending By Winning Candidates - 2000[7]

	Senate	House
All	$7,506,743	$849,158
Challenger	$8,828,989	$2,024,725
Incumbent	$4,444,501	$782,460

Average Spending By Winning Candidates - 2002[8]

	Senate	House
All	$4,812,159	$898,184
Challenger	$6,826,395	$1,595,805
Incumbent	$4,681,870	$826,942

---

7 *See* OpenSecrets.org, The Big Picture, 2000 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2000 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2000 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2000 (last visited Nov. 17, 2005).

8 *See* OpenSecrets.org, The Big Picture, 2002 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2002 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2002 (last visited Nov. 17, 2005). Although these figures from the 2000 and 2002 elections may be somewhat exaggerated by a few self-funding challengers with disproportionately high campaign expenditures, that cannot fully account for the significant difference between successful challengers' and successful incumbents' average expenditures. *See* OpenSecrets.org, The Big Picture, 2002 Cycle: Millionaire Candidates, *available at* http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002.

In both election cycles and both Houses of Congress, the average amount spent by winning *challengers* was significantly more than the average amount spent by winning *incumbents* and, consequently, more than the average amount spent by all winning candidates. Clearly, if incumbents wish to insulate themselves from effective challenges, they merely need to ensure that challengers are limited to spending no more than the historical average. This is exactly what Act 64 accomplishes.

Moreover, as Judge Jacobs noted, "[t]he Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest—which of course is more frequently a hurdle for challengers than for incumbents." Pet. App. 338a (Jacobs, J., dissenting from the denial of rehearing en banc). To challengers confronted with the nearly insurmountable advantages that Vermont's expenditure limits afford to incumbents—and to voters eager to be given a bona fide choice—the marginal 10-15% spending advantage offered by Act 64 provides little solace.

Act 64's exceptionally low contribution limits further serve to entrench incumbents because low contribution limits have their greatest impact upon challengers. Incumbents can rely on their name recognition, established donor lists, and free media. In contrast, challengers not only need more money overall, but they also usually rely on a small base of large donors until they become known by the voting public. Pet. App. 261a n.23. Act 64's expenditure and contribution limits hinder electoral challenges before they have a chance to gain momentum. *See Buckley*, 424 U.S. at 31 n.33 (noting that in some situations, "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). And without vigorously contested electoral races, voters cannot meaningfully exercise their right to participate in our republican form of government.

B. Expenditure Limits Reduce Political Accountability And Marginalize Ordinary Citizens.

The Second Circuit's opinion speaks repeatedly of "[e]vidence at trial [that] overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics." Pet. App. 129a. This "perception of corruption" is a persistent theme in Vermont's defense of Act 64. *See* Resp. & Part. Opp'n Pet. Writ Cert. at 7 ("All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.").

The argument fails on two levels. First, Vermont's contention that this concern demands governmental intervention inherently discounts the voting public's ability to address potential corruption through elections. Second, when coupled with contribution limits, expenditure limits actually increase the perception of so-called "big-money influence" on politics by drastically reducing the number of donors required to fund an election. If—as both the district court and Second Circuit suggested—the Vermont public is concerned that money buys influence, expenditure limits are likely to exacerbate such concerns. As the number of donors who contribute to a candidate decreases, the influence (or perceived influence) of any single donor increases.

The First Amendment empowers informed citizens—not elected officials—to decide whether to trust candidates and to vote accordingly. Vermont's assumption that it can restrict political speech in an effort to promote trust in elected officials runs directly counter to the principles of self-government embodied in the First Amendment. *See Buckley*, 424 U.S. at 57. Under Act 64, those candidates who are also elected officials decide how much their opponents are permitted to spend. Elections are usually fiercely competitive events, and—as with any competition—the competitor who

controls the rules has an enormous advantage over the other competitors.

Moreover, Act 64's expenditure limits rest on the premise that "public involvement decreases as spending increases." Pet. App. 278a (Winter, J., dissenting). This proposition is fundamentally flawed and belied by the fact that the most heavily contested elections often involve the most spending. Experience in Vermont bears this out. Record amounts were spent on Vermont's 2000 gubernatorial election in which several divisive issues were at stake; far from alienating voters, these expenditures actually captured voters' attention, resulting in 34.5% more people voting than in the prior gubernatorial election. Pet. App. 278a (Winter, J., dissenting).

Act 64's expenditure limits also ignore the *salutary* effects of fundraising activities. Indeed, fundraising events are not only a means of gathering contributions; they are also a mechanism through which candidates solicit votes and inform voters about their positions. Moreover, as this Court recognized in *Buckley*, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. Expenditure limits reduce the likelihood that the "size and intensity" of support for a particular candidate will be translated into political speech. Expenditure limits thus hurt those they are purportedly designed to protect—the voters. Government rationing of campaign spending inhibits voters' ability to perceive which ideas are widely held and resonate with a majority of the electorate.

In upholding the Act, the Second Circuit emphasized Vermont's belief that candidates tend to "expend[] more effort on relatively generous contributors over less important ones." Pet. App. 144a. Vermont assumes that expenditure limitations ensure "that candidates and officeholders will spend . . . more time interacting with voters." Pet. App. 127a

(alteration in original). In reality, expenditure limits actually encourage candidates and officeholders to spend *more* time interacting with *fewer* voters. If Act 64's assumption that money buys access is correct, the use of expenditure limits in conjunction with contribution limits actually increases the access and influence of "large" contributors ("large" meaning those capable of providing the maximum allowable contribution amount) at the expense of small contributors.

This result is attributable to the fact that the vast majority of campaign donors in Vermont historically have been "small" contributors. In the elections immediately preceding Act 64's passage, for example, between 82% and 96% of all contributions were below Act 64's limits. Pet. App. 39a-40a. In the aggregate, these "small" contributions likely represented a sizable portion of a candidate's total funds and therefore were valuable to the candidate, resulting in significant access for small contributors. With the imposition of expenditure limits, there are now more contributions available than a candidate can legally utilize. The most efficient way for a candidate to reach the fundraising limit is therefore to focus exclusively on comparatively "large" contributors. Thus, contrary to expectations, the combination of contribution and expenditure limits may actually eliminate the role of Vermont's small contributors and consolidate the influence of Vermont's largest campaign donors. There is accordingly a very real danger that large contributions "may eliminate the need for, and in that sense crowd out, smaller individual contributions." BREYER, *supra*, at 44.

Vermont also failed to consider that Act 64's particular combination of contribution and expenditure limits actually exacerbates the "specter of corruption" by radically reducing the number of contributors necessary or useful to any one candidate. Pet. App. 133a, 134a. Before Act 64, a candidate was likely to have many contributors, thereby spreading the candidate's funding among a broad group of donors. Act 64 inverts this tendency, consolidating the opportunity to con-

tribute (and, under Vermont's assumption, to influence) in the hands of a few. A candidate for state representative, for example, is likely to have as few as 10 contributors (10 contributors giving the $200 maximum contribution, which equals the $2,000 spending limit). Few candidates would opt to make hundreds of calls and attend dozens of public events if they could fully fund their campaign with 10 telephone calls. Act 64 therefore creates the very problem it was purportedly designed to resolve by "requir[ing] candidates to seek and rely on a smaller number of larger contributors . . . rather than a large number of small contributors." Pet. App. 131a (quoting 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5)).

Moreover, because Act 64 sharply reduces the number of contributors, it exaggerates the potential for (and appearance of) corruption from each contribution. The more donors that contribute to a campaign, the less financial influence any one donor can have on that candidate. The public perception of improper influence from any one donor is also diminished when that donor is merely one of many. Before Act 64, a $200 donor may have been the source of only a small percentage of a Vermont state representative candidate's overall contributions and likely was one of many contributors. After Act 64, the same donor will be assured of having given 10% of the candidate's campaign funds and may be one of only ten contributors.

In Federalist 10, James Madison recognized what has become a famous solution to our young republic's problem of factions (*i.e.*, special interests). Rather than attempting to remove the "causes of faction," which Madison deemed impossible without destroying the liberty "essential to political life," Madison suggested that broadening the electoral base would keep any one interest from dominating. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter rev. ed., 2003). This "republican remedy for the diseases most incident to republican government," *id.* at 79, reflects a

political understanding that is still celebrated in the "marketplace of ideas" conception of the First Amendment.

In the same way that our republic is moderated by competing political interests, competing monetary interests "encourag[e] the public participation and open discussion that the First Amendment itself presupposes" by "broaden[ing] the base of a candidate's meaningful financial support." *Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring). In the absence of expenditure limits, politicians are encouraged to reach out to more than a bare majority of their constituents and to avoid dismissing minority interests without careful consideration. Although a politician may need only 51% of the vote, fundraising considerations ensure that the interests of more than 51% of constituents will be considered. Politicians are encouraged to seek consensus solutions that satisfy more than a simple majority. Like Madison's solution to factions, the First Amendment's prohibition on expenditure limits ensures that elected officials are not concerned only with the interests of those who elected them.[9]

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[9] Act 64's presumption that spending by parties or PACs that benefits six or fewer candidates is a "related expenditure" similarly violates the First Amendment. The presumption discourages these organizations, which are now central to the political process, from engaging in independent political speech relating to a particular issue out of concern that the Act will automatically attribute the costs of their speech to a candidate. Similarly, these organizations will hesitate to speak in opposition to a candidate from fear that the cost of their speech will be automatically attributed to that candidate's opponent—or, at any rate, that the opponent will be put to the cost of demonstrating that it should not be so attributed, all against the backdrop of Act 64's very low expenditure limits. The First Amendment does not countenance such a chilling effect on political speech.

Even more perniciously, the combination of Act 64's coordinated-expenditure presumption and its expenditure limits could be used to effectively silence an opponent's campaign. A candidate's opponents could form PACs and use those PACs to run ads "supporting" the candidate on issues that have no importance to the electorate. Under Act 64's presump-

* * *

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). At best, Act 64 illegitimately subordinates this core principle of self-government in a misguided attempt to ameliorate political inequalities. At worst, Act 64 is a bald-faced example of incumbent protectionism. Either way, it cannot survive First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

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[Footnote continued from previous page]

tion, the cost of the PACs' ads would automatically count toward the candidate's expenditure limit. A candidate's permissible expenditures could thus be exhausted by his adversaries. The problem is made worse because expenses in challenging the presumption would also be attributed to the candidate's expenditure limit. Pet. App. 226a.

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IN THE

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NEIL RANDALL, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

WILLIAM H. SORRELL, *et al.*,
Conditional Cross-Petitioners,
v.
NEIL RANDALL, *et al.*,
Conditional Cross-Petition Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND CONDITIONAL CROSS-PETITION RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that participates extensively in national, state, and local elections.[1] The RNC is subject to and complies with applicable rules imposed by the federal and state governments, including Vermont. The RNC has in the past and will in the future support candidates who are subject to the provisions of Vermont's Act 64.

SUMMARY OF ARGUMENT

1. Act 64's presumption that political party independent expenditures primarily benefiting six or fewer candidates are coordinated with those candidates offends the First Amendment for the reasons set forth in *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado I*"). In *Colorado I*, the Court struck down a presumption that political party independent expenditures were coordinated with candidates because such a blanket presumption itself infringes speech, and independent expenditures present no prospect of corrupting the benefited candidate. Moreover, Act 64's presumption offends the Due Process Clause because it reverses the burden of persuasion in a way that punishes speech, sets forth no definitive mechanism for challenging the application of the presumption to a particular expenditure, and fails to guarantee a prompt resolution of any such challenge so that the speech can proceed.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

2. Act 64's scheme of expenditure limitations violates the First Amendment by imposing "direct and substantial restraints on the quantity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The proffered justifications for Act 64 do not withstand strict scrutiny. As explained in *Buckley*, 424 U. S. at 45-46, 47-48, expenditure limits do not correlate to any anti-corruption purpose. Moreover, the asserted interest in protecting the time of incumbent politicians is neither compelling nor related to the imposition of expenditure limits, since much if not most political fundraising by such means as direct mail and the Internet is done with little personal involvement of the candidate, the expenditure limits do not ensure that officeholders will devote more time to their official responsibilities (as opposed to other campaign activities), and the expenditure limits enhance the powers of incumbency. Finally, the expenditure limits are neither narrowly tailored to advance the asserted state interests, nor are they the least restrictive means for doing so, since Vermont has not, unlike many other states, enacted legislation that prohibits fundraising while the legislature is in session. Finally, the suggestion that this Court revisit its precedents holding expenditure limitations offensive to the First Amendment fails to satisfy the threshold requirements for overruling settled precedent.

ARGUMENT

I. ACT 64'S PRESUMPTION OF COORDINATION VIOLATES THE FIRST AMENDMENT AND DUE PROCESS CLAUSE.

Act 64 provides that independent expenditures made by a political party "that primarily benefit[] six or fewer candidates" associated with that party are presumed to be coordinated expenditures on behalf of those candidates. VT. STAT. ANN. tit. 17, § 2809(d). Any coordinated expenditure,

in turn, is deemed to be "a contribution to the candidate on whose behalf it was made," VT. STAT. ANN. tit. 17, § 2809(a), and is subject to the applicable limit for contributions to that candidate. *See* VT. STAT. ANN. tit. 17, § 2809(a).[2] The Act defines "expenditure" broadly to encompass any spending "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." VT. STAT. ANN. tit. 17, § 2801(3). Thus, an "independent expenditure" under Act 64 is a very broad and vague concept.[3]

The text of Act 64 does not state whether this presumption of coordination is conclusive or rebuttable, but administrative guidance promulgated by Vermont's secretary of state suggests that the presumption is rebuttable. *See* Guide to Vermont's Campaign Finance Law 30 (November 2005) *available at* http://vermont-elections.org/elections1/2005_cf_guide_1118.htm ("When an expenditure is presumed to be a related expenditure, the presumption can be overcome by evidence that the elements of the definition in section 2809(c) were not met.").

Although Act 64 does provide that a *candidate* may bring an expedited court action to declare that expenditures made

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[2] Violations of Act 64's contribution limits through independent expenditures deemed to be coordinated expenditures appear to be civil, as opposed to criminal offenses. *See* VT. STAT. ANN. tit. 17, § 2806(b) (providing for a civil penalty of up to $10,000 for each violation of Act 64). A $10,000 civil penalty is very substantial: it is more than 3-percent of the expenditure limit for candidates for Governor; 10-percent for Lieutenant Governor; and 22-percent for certain executive branch offices. The penalty exhausts the spending limits for State Senate, county office, and State Representative.

[3] The RNC contends that the definition of "expenditure" is grossly overbroad in numerous respects, but this issue is not currently before the Court.

on behalf of an *opposing* candidate are coordinated, *see* VT. STAT. ANN. tit. 17, § 2809(e), neither the Act nor administrative guidance provides a similar judicial or administrative mechanism for a *political party* making such expenditures to bring a court action or administrative proceeding to rebut the presumption. Indeed, the enumeration of one mechanism for seeking review under 2809(e) suggests that other modes of review are prohibited. *See In re 1650 Cases of Seized Liquor*, 721 A.2d 100, 106 (Vt. 1998) (applying *expressio unius* canon of construction to Vermont statute).

A. Independent Expenditures Are Fully Protected By the First Amendment.

This Court has twice reviewed restrictions on political party independent expenditures and both times has held them unconstitutional. In *Colorado I*, 518 U.S. at 617-18, the Court ruled that an expenditure by the Colorado Republican Party was constitutionally protected, and rejected the argument that political parties have a lesser right to make independent expenditures than other speakers: "We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 618 (principal opinion by Breyer, J.). The Court was unpersuaded by the FEC's presumption that, "as a matter of law," party expenditures are coordinated with candidates, writing "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

More recently, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 213-19 (2003), the Court unanimously struck down section 213 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 94, which

required political parties to elect between making coordinated expenditures and independent expenditures. Again, the Court emphasized that political party independent expenditures are "plainly . . . entitled to First Amendment protection," and that no "meaningful purpose" was served by restricting such expenditures. *McConnell*, 540 U.S. at 217-18.

B. Act 64's Related Expenditure Provision Will Severely Restrict or Eliminate Independent Expenditures by Political Party Committees.

Section 2809(d) was intended to and does encompass the vast majority of political party independent expenditures. Any independent expenditure criticizing a candidate would presumably benefit only that candidate's opponent, and would fall within the presumption. Any independent expenditure praising a single candidate would fall within the presumption. Indeed, it is unusual for an independent expenditure to "benefit" more than one candidate, meaning that the presumption will swallow the bulk of independent party spending.[4]

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[4] Judicial decisions addressing particular independent expenditures confirm this point. *See e.g., Colorado I*, 518 U.S. at 608 (concerning independent expenditures by a political party committee for advertisements about U.S. Senate candidate Timothy Wirth); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 483 (1985) ("*NCPAC*") (concerning independent expenditures by political action committees in support of President Ronald Reagan); *Federal Election Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (concerning independent expenditures by a non-profit organization for advertisements opposing Speaker of the House Newt Gingrich); *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987) (concerning independent expenditures by an advertiser opposing President Jimmy Carter); *Federal Election Comm'n v. Cal. Democratic Party*, No. Civ. S-03-0547 FCD DAD, 2004 U.S. Dist.

(continued...)

Moreover, section 2809(a) imputes independent expenditures by political parties to candidate committees, counting them not only as "contributions" to the beneficiary candidate, and thus subjecting them to the draconian contribution limits, but presumably also against that candidate's spending limit. This provision is patently unfair to candidates because independent expenditures – which by definition the candidate does not control or even know are coming – may deplete candidate spending allowances. Consequently, political party committees will be deterred from making any independent expenditures because their activities may preempt the favored candidate's ability to communicate directly with voters. Plainly, such deterrence was the very purpose of the provision.[5]

C. The First Amendment Does Not Permit the Government To Presume that Speech Is Unprotected Until the Speaker Rebuts the Presumption.

Section 2809(d) creates the same type of "presumption of coordination" that this Court found improper in *Colorado I*,

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LEXIS 7269, at *3-*5 (E.D. Cal. 2004) (concerning independent expenditures by a political party committee in support of Congresswoman Lois Capps).

[5] According to the district court below, the restraint on independent expenditures in section 2809 "was designed to plug a loophole that would have allowed for circumvention of Act 64's individual contribution limits." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490 (D. Vt. 2000). The restriction would prevent political candidates from evading campaign finance restrictions "by asking others to collect and spend money for them." *Id.* This is an argument for regulating *coordinated expenditures*, however, not independent expenditures, which involve no prior communication between the political party and the candidate's campaign.

518 U.S. at 622. As the Court explained, "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Under *Colorado I*, section 2809(d) must fail.

The lower court attempted to distinguish *Colorado I* on the ground that the presumption of coordination in that case was "conclusive," whereas the presumption in section 2809(d) is ostensibly rebuttable, through as yet unspecified procedures. *See Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004). This is no distinction at all; as did the presumption in *Colorado I*, section 2809(d) plainly places a severe burden on independent speech for no valid reason. The time, effort, and expense necessary to rebut the presumption is a burden on speech, especially in the fast moving context of a political campaign. The result will be little if any independent party spending. No government interest has been advanced to justify this suppression of speech.[6]

Further, the government may not simply presume speech unprotected until the putative speaker rebuts the presumption. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (the burden of proving that speech is unprotected "must rest on the censor"); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("In practical operation, therefore, this procedural device [a statutory presumption that speech is unprotected] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.").

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[6] In what appears to be the only reason for the presumption, Vermont State Representative Terry Bouricius, who is the sponsor of the legislation, asserted that expenditures supporting six or fewer candidates were "more likely to be part of [a] campaign." *Landell*, 118 F. Supp. 2d at 492 n.28.

The net effect of section 2809(d) is to restrict speech unless and until the party obtains a ruling, if such a ruling is even allowable, that the speech is *not* coordinated. In this manner, the presumption creates a prior restraint of speech that is impermissible under the First Amendment. *See Freedman*, 380 U.S. at 59-60 (Maryland statute requiring license for motion picture displays was an impermissible prior restraint because it, *inter alia*, placed on exhibitor the burden of persuasion that the film was protected expression). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 124-25 (D.C. Cir. 1977) (FCC regulation establishing rebuttable presumption that certain speech was unprotected was impermissible prior restraint).

D. Act 64's Presumption of Coordination Violates Due Process.

1. Act 64's Presumption of Coordination Violates Due Process By Shifting the Burden of Persuasion.

Even if establishing the presumption did not so plainly offend the First Amendment, and even if there were a realistic mechanism of review, section 2809(d) would be infirm as a denial of Due Process. By imposing a mandatory rebuttable presumption that a political party's independent expenditures are coordinated, Act 64 shifts the burden of persuasion to a political party. *See Francis v. Franklin*, 471 U.S. 307, 317 (1985) ("A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding."); *see also County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979)

(mandatory presumption "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts").

Under the Due Process Clause, a state may not impose a mandatory presumption in criminal cases, even if rebuttable, because it has the impermissible effect of shifting the burden of persuasion. *See Francis*, 471 U.S. at 317 ("A mandatory rebuttable presumption is perhaps less onerous [than a conclusive presumption] from the defendant's perspective, but it is no less unconstitutional. Our cases make clear [such] shifting of the burden of persuasion . . . is impermissible under the Due Process Clause.").

This same heightened Due Process scrutiny applies to presumptions under civil statutes involving "affirmative Government action which seriously curtails important liberties cognizable under the Constitution." *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975). Just as the government has the burden of persuasion in criminal cases, the First Amendment places on the government the burden of persuasion to show that speech is unprotected. *See Freedman*, 380 U.S. at 58. More specifically, in the context of independent expenditures, the government has the burden of persuasion that such expenditures are coordinated and thus subject to contribution limits. *See Colorado I*, 518 U.S. at 616.

Accordingly, section 2809(d)'s mandatory rebuttable presumption violates Due Process by shifting the burden of persuasion to political parties to prove that their independent expenditures are not coordinated. *See Speiser*, 357 U.S. at 526 ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct

enactment. The power to create presumptions is not a means of escape from constitutional restrictions.") (citing *Bailey v. Alabama*, 219 U.S. 219, 239 (1911)).

2. Act 64 Fails To Provide Adequate Procedural Safeguards to Allow for the Prompt Rebutting of the Presumption.

Act 64's related expenditure provision fails to provide adequate procedural safeguards for political parties. Although Vermont's secretary of state asserts in administrative guidance that the presumption of coordination is rebuttable, neither the statute nor the secretary of state's administrative guidance identifies any process by which a political party might rebut this presumption and obtain approval for the independent expenditure. The absence of a clear process for timely rebutting the presumption is an independent First Amendment violation. *See Freedman*, 380 U.S. at 60 (Maryland statute barring exhibition of motion pictures until exhibitor proved the speech was protected was invalid under the First Amendment because, *inter alia*, the statute provided "no assurance of prompt judicial determination").

The very uncertainty of any available procedure for securing prompt judicial or administrative review of the presumption will chill protected speech. As this Court has explained, "[a] scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS, Inc., dba Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 227 (1990). "Until a judicial decree to the contrary," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), Act 64's presumption stands. "In the interim, opportunities for speech are irretrievably lost." *Id.*

In the context of *political* speech in the heat of an election, delays caused by procedural deficiencies are constitutionally intolerable. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *see also Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (a delay "of even a day or two" may be intolerable when applied to 'political' speech in which the element of timeliness may be important").

II. VERMONT'S EXPENDITURE LIMITATIONS VIOLATE THE FIRST AMENDMENT.

At least since *Buckley*, it has been clear that campaign expenditure limits violate the First Amendment because they "impose direct and substantial restraints on the quantity of political speech." 424 U.S. at 39. The reasons for this holding are as obvious today as they were 30 years ago: First, money enables speech, and more money enables more speech. Second, under a regime of contribution limits, greater expenditures necessarily imply a larger and broader base of financial support, reducing rather than increasing the reality or the appearance of *quid pro quo* corruption. Third, expenditure limits necessarily fall disproportionately on non-incumbents, who lack the profile and name recognition of incumbents.

This Court has repeatedly reaffirmed *Buckley's* holding that expenditure limits restrict core political speech and thus offend the First Amendment in the most fundamental way. *See, e.g., McConnell*, 540 U.S. at 120 (*Buckley* "treated the limitations on candidate and individual expenditures as direct restraints on speech"); *Federal Election Comm'n v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 437

(2001) ("*Colorado II*") ("Later cases have respected this line between contributing and spending."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) ("[A]n expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents.'") (citing *Buckley*, 424 U.S. at 22); *Colorado I*, 518 U.S. at 610, 614-15; *Federal Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *NCPAC*, 470 U.S. at 491. The legislative history of Act 64 makes plain that it was intended to be, and is in fact, a direct assault on this settled and sensible precedent. *See* Memorandum from Vt. Sec'y of State Deborah L. Markowitz to the S. Gov't Operations Comm. and H. Local Gov't Comm. (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001gamemocf.html.[7]

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[7] This Court's decisions applying the doctrine of *stare decisis* argue strongly against overturning the holding in *Buckley*, 424 U.S. at 143. First, *Buckley's* holding that expenditures are constitutionally protected established an important liberty interest, and political parties, candidates, and other participants in the political system have acted with reliance on that holding for the last 30 years. *Cf. Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[W]hen a Court is asked to overrule a precedent *recognizing* a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.") (emphasis added). Second, *Buckley's* holding that expenditures are constitutionally protected has been repeatedly reaffirmed by this Court, and has caused no uncertainty or instability in the law. *Cf. id.* (consideration weighing in favor of overturning prior decision is if the prior decision "itself causes uncertainty, [because] the precedents before and after its issuance contradict its central holding"). Third, as explained in text, *Buckley's* rationale with respect to the constitutional protection afforded expenditures was entirely correct. *Cf. id.* (consideration weighing in favor of overturning prior decision was that its rationale did not "withstand careful analysis").

A. Expenditure Limits Are Subject to Strict Scrutiny Because They Severely Burden Core Political Speech.

Political speech lies at "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," expenditure limitations constitute "substantial rather than mere theoretical restraints on the quantity and diversity of speech." *Id.* at 19. Applying "exacting" constitutional scrutiny, *id.* at 44-45, the *Buckley* Court struck down all the expenditure limits that were before it: campaign expenditure limits, *id.* at 55-56; limits on independent expenditures by individuals and groups, *id.* at 45-48; and limits on expenditures by a candidate of his own money, *id.* at 53. In subsequent decisions, the Court struck down limits on independent expenditures by political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01, and on independent expenditures by political parties, *Colorado I*, 518 U.S. at 617-18 (principal opinion by Breyer, J.). Since *Buckley*, neither this Court, nor any circuit court until the one below, has upheld a ceiling on political expenditures. In view of this consistent precedent, it is striking that the lower court failed to explain why departure from it is warranted.

These decisions have applied strict scrutiny, requiring a showing of "a sufficiently strong governmental interest" served by the restriction and a showing that the restriction is "narrowly tailored to the evil that may legitimately be regulated." *NCPAC*, 470 U.S. at 496. *See also Mass. Citizens for Life*, 429 U.S. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."); *McConnell*, 540 U.S. at 135-36 (distinguishing contribution limits from expenditure limits because the latter "'preclud[e] most

associations from effectively amplifying the voice of their adherents'") (internal citations omitted); *Shrink*, 529 U.S. at 386-88 (emphasizing that restrictions on expenditures are "direct restraints on speech," subject to more rigorous scrutiny than contribution limits). The expenditure limits at issue here cannot survive strict scrutiny.

B. Act 64's Expenditure Limits on Candidates Are Not Supported by Valid Governmental Interests.

In the thirty years since this Court decided *Buckley*, the Court has identified *only one* compelling interest that can justify campaign finance restrictions: the prevention of actual and apparent corruption in the electoral process. *See NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."). *See also McConnell*, 540 U.S. at 142 ("Congress enacted § 323 as an integrated whole to vindicate the Government's important interest in preventing corruption and the appearance of corruption.").

Buckley explicitly rejected various justifications offered in defense of spending limits. For example, it held that leveling the playing field to provide equivalent opportunities to candidates "is wholly foreign to the First Amendment." 424 U.S. at 48-49. It considered and rejected concerns about rising campaign costs because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57.[8] So sound are these repudiations that the

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[8] *Compare Buckley*, 424 U.S. at 57 ("Appellees and the Court of Appeals stressed statistics indicating that spending for federal election (continued...)

lower court did not rely on these justifications in upholding the spending limits here.

Rather, the lower court upheld the restraints based upon a purported desire to prevent corruption and a desire to save incumbent legislators time from fundraising. Neither justification withstands analysis.

1. A Legislative Desire to Prevent Actual or Apparent Corruption Cannot Excuse *Expenditure* Limits.

In 1997, the Vermont legislature enacted Act 64 specifically to challenge this Court's holding in *Buckley* rejecting expenditure limitations. *See* Markowitz Memorandum (Jan. 9, 2001); *see also Landell*, 382 F.3d at 185 (Winter, J., dissenting). Because neither Vermont nor the lower court have identified anything in the American political process – much less in the First Amendment – that has materially changed in the last 30 years, the RNC respectfully urges this Court to reaffirm that the First Amendment proscribes expenditure limits.[9]

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campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period."), *with Landell*, 382 F.3d at 101 (citing findings by the Vermont General Assembly that: (1) election campaigns for statewide and state legislative offices are becoming too expensive; and (2) citizen interest, participation, and confidence in the electoral process is lessened by excessively long and expensive campaigns).

[9] Passage of Act 64 in Vermont appears less the result of any overriding public concern with corruption than a desire by a majority of Vermont's legislature to challenge the settled precedent barring spending limits.

This Court has repeatedly rejected the anti-corruption interest as a valid justification for expenditure limitations. In *Buckley*, this Court held this interest was *not* sufficient to justify the Act's limits on independent expenditures, 424 U.S. at 45-48, expenditures derived from a candidate's personal funds, *id.* at 53, and overall candidate expenditures. *Id.* at 55-56. Since *Buckley*, the Court has similarly held that the anti-corruption interest does not justify limits on independent political expenditures by political parties, *Colorado I*, 518 U.S. at 617-618 (principal opinion by Breyer, J.), and political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01.

The reason is simple. Limits on political expenditures directly limit political speech. Yet, under a regime of contribution limits, *more* money raised *lessens* the influence of each contributor. Further, once money is raised in compliance with contribution limits, the act of spending the money – on handbills, candidate appearances, or media advertising – has no actual or apparent corrupting potential.

This Court has defined corruption as "a subversion of the political process." *NCPAC*, 470 U.S. at 497. "Elected officials are influenced to act contrary to their obligations of office *by the prospect of financial gain* to themselves or infusions of money into their campaigns." *Id.* (emphasis added). Actual or apparent corruption (including undue contributor influence) in the realm of campaign finance exists primarily, if not exclusively, in transactions involving contributions, whether directly to a candidate, *see Buckley*, 424 U.S. at 25-29, or to a party committee at the behest of, or with the knowledge of, a candidate of that party. *McConnell*, 540 U.S. at 145-54. Thus, in this Court's decisions a political contribution to a candidate or a political party may give rise to the appearance of an unlawful exchange or undue influence, but a payment by a candidate

to a vendor, for example, will not. No *quid pro quo*, appearance of a *quid pro quo*, or appearance of undue influence occurs when a candidate merely spends money that has been legally raised.

It is noteworthy that there is no record in this case supporting the theory that expenditure limits are necessary to curtail corruption or the appearance of corruption in Vermont elections. Despite findings of voter apathy and frustration about costly campaigns – concerns not bearing directly upon the issue of corruptive influences in politics – proponents of Vermont's expenditure limits have been unable to identify ways in which unlimited campaign expenditures give rise to the appearance of corruption.[10] Rather, they have hypothesized about corruption caused by large campaign *contributions*.

In this case, even the lower court has acknowledged that, based upon the *Buckley* opinion, the anti-corruption interest, standing alone, is insufficient to justify the limitations on candidate campaign expenditures that were enacted by the Vermont legislature. *See Landell*, 382 F.3d at 119. This Court should reaffirm *Buckley*'s holding that expenditure limits do not deter corruption or the appearance of corruption. That holding was correct then, and it is still correct today.

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[10] *See generally Landell*, 118 F. Supp. 2d at 465-474; *see also Landell*, 382 F.3d at 189-91 (Winter, J., dissenting) ("The only particularized evidence of improper influence relied upon by my colleagues consists of one anecdote. It involved 'widely reported' meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations, Maj. Op. at 50. We are asked to assume in this case that unspecified *contributions* – in contrast to, perhaps, numbers of voters involved – were the decisive factor.") (emphasis added).

2. Incumbent "Time-Protection" Is Not a Valid Governmental Interest.

The Vermont legislature asserts a compelling government interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties." *Landell*, 382 F.3d at 115. The lower court recognized that this interest, alone, would be insufficient to support curbs on political expression, *see id.* at 125; it nevertheless ruled that the so-called "time protection interest" coupled with the anti-corruption interest, are sufficiently compelling reasons to excuse candidate expenditure limits. *See id.*

The premise of the time-protection interest is that an incumbent politician will be set free from the shackles of fundraising responsibilities if cost controls are implemented on the campaigns of the incumbent and his challengers.[11] By liberating the incumbent from the time-consuming burden of raising unlimited sums to funding for a successful re-election, the incumbent will be able to devote his bonus hours to "important government business" that may include "studying legislative proposals or meeting with constituents who may not be likely donors." *Id.* at 123.

The flaws in this reasoning are too numerous to compile, but a few deserve mention.

First, the legislature and the lower court incorrectly assumed that this asserted interest would arrive at this Court

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[11] The time-protection interest asserts that saving *incumbents* time for additional *legislative* responsibilities is a compelling government interest. Even if this dubious proposition were true, no argument has been made that there is a compelling government interest in creating more time in a challenger's schedule.

fresh and novel. To the contrary, the interest was asserted in *Buckley*, but merited barely a mention by this Court. As Judge Winter, who argued *Buckley* before this Court, recounted in his dissent in *Landell*, 382 F.3d at 188-89:

> The time-protection argument was relied upon by the Court of Appeals in *Buckley* in upholding [FECA], was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

Although the Court expressly and soundly rejected equalizing candidate resources and containing political campaign costs as justifications for expenditure limits, 424 U.S. at 26, 54-59, its implicit relegation of the time-protection interest to less discussion than these rejected justifications speaks volumes. In fact, the Second Circuit is the first court to credit such an explanation for spending limits. *See generally Landell v. Sorrell*, 406 F.3d 159, 172 (2d Cir. 2005) (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("[I]n the nearly thirty years since *Buckley*, no court of appeals has found that saving a candidate's time from fundraising is a sufficient interest to justify stifling political speech.").

Second, this purported justification erroneously assumes that total campaign expenditures of *money* are closely correlated with total expenditures of candidate fundraising *time*. This asserted correlation falters for many reasons. To begin with, campaigning and fundraising are not distinct; candidate appearances and speeches (which Act 64 allows to continue) often have a fundraising component. Moreover,

many candidates fund their own campaigns in whole or in part with personal funds, reducing or eliminating time spent fundraising. In addition, professional political fundraisers, many of whom charge a percentage of the amounts raised, as well fundraising volunteers, carry the load for many if not most candidates, reducing the time spent by candidates on fundraising. National, state, and local political parties also provide fundraising assistance, as well as direct funding, for candidates in competitive races.

Just as important, campaigns raise money by way of direct mail and Internet solicitations, requiring little if any candidate time. As one example, during the 2004 Democratic Presidential Primary, Vermont Governor Howard Dean – one of the proponents of Act 64, who is quoted at the outset of the lower court's opinion[12] – shattered fundraising records by raising almost $15 million, more than any other Democratic candidate in history in a single fundraising quarter. *See* Alexis Rice, Fellow at the Center for the Study of American Government at Johns Hopkins University, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning* 45 (2004), *available at* http://www.campaignsonline.org/. *Half* of Governor Dean's contributions were secured through the Internet, *see id.*, requiring *no* investment of his personal time. In the subsequent fundraising quarter, 84,713 supporters made 110,786 contributions to Governor Dean's campaign. *See id.* The average amount per contribution was less than $62. *See id.*

Later in 2004, Senator John Kerry also used the Internet to raise nearly $12.5 million in one month and $3 million *in*

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[12] *See Landell*, 382 F.3d at 96.

only one day for his Presidential Campaign. *See* Glen Justice, *Kerry Sets Web Record in Donations*, N.Y. TIMES, July 2, 2004, at A14. As former Federal Election Commission Chairman Trevor Potter has explained, "The small donor, Internet component . . . demonstrates the importance of Internet fundraising." Lisa Getter, *The Race to the White House: Kerry up to $180 Million*, L.A. TIMES, July 2, 2004, at A27.

The well-publicized success of federal candidate fundraising on the Internet has led state and local candidates to incorporate Internet fundraising as part of their campaign strategies. *See e.g.*, Tracie Dungan, *Hopefuls Putting Hands Out on Web: Campaigns Tap Online Potential*, ARK. DEMOCRAT-GAZETTE, Nov. 13, 2005. Indeed, many *Vermont* political parties[13] and politicians, including incumbent candidates for Lieutenant Governor,[14] State Senate,[15] State Representative,[16] and Mayor,[17] have used the Internet to raise campaign funding without consuming candidate time. In short, there is no sound basis either in this record or elsewhere to show convincingly that responsible public officials are shirking their official duties to raise campaign cash.[18]

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[13] *See* http://www.vtgop.org; http://www.vtdemocrats.org; http://www.vtlp.org; http://www.progressiveparty.org; and http://www.windhamdem.org.

[14] *See* http://www.briandubie.com.

[15] *See* http://www.mattdunne.com.

[16] *See* http://www.timjerman.com and http://sueminter.com.

[17] *See* http://www.hindaformayor.com.

[18] Candidates vary immensely in their ability to raise money. One candidate might devote countless hours to fundraising without accumulating funds that reach the expenditure limit; another might reach or exceed the same limits in substantially less time. Put another way, Act

(continued...)

Third, as the Sixth Circuit has observed, the "time-protection" justification is inextricably linked with – and in reality is a euphemism for – the cost containment justification repudiated in *Buckley*. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 916-17 (6th Cir. 1998) ("The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.").

Fourth, the sole purpose of the time-protection interest is to assist incumbent legislators in enhancing their job performances by decreasing the number of hours necessary to raise money to compete with their challengers.[19] By enacting dollar limits to assist legislator-candidates with their official job responsibilities, however, the legislature unfairly burdens challengers and further insulates incumbents from competitive elections.

Taking the preferred justification at face value, we are told that incumbent legislators who spend less time fundraising because of expenditure limits are able to schedule more time for official responsibilities such as studying legislative proposals, attending legislative hearings, and

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64 incorrectly assumes that fundraising places equal demands on the time of all candidates.

[19] *See generally Landell*, 406 F.3d at 172 (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, 'The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier.' It has an interest in the former, but certainly not the latter.").

meeting with constituents. But all of these activities lead to increased political exposure for incumbents. Empowered with the bonus hours made possible by the expenditure caps, they are more capable of attending "meet and greets," speaking at Rotary Club and Jaycee meetings, holding press conferences, meeting with newspaper editorial boards, and participating in local television and radio interviews. In sum, any additional time made available and actually used for official duties will only enhance the power of incumbency, because incumbents, unlike challengers, can more easily attract free media attention and exposure by their official activities.

Non-incumbent candidates, on the other hand, are much less likely to benefit from the asserted time-protection resulting from Act 64's expenditure limits. With expenditure limits, the ability of challengers even to divert the unused fundraising time to travel and campaign events will be limited because all those campaign activities cost money. Precisely because they are less able to attract media attention and exposure than incumbents, challengers need to spend additional money to compensate for the incumbent's natural advantages.[20] For example, incumbency provides several

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[20] Validating (but not ameliorating) this concern, Vermont arbitrarily enacted a "rare" accommodation for challengers in its campaign finance law that requires certain incumbents to spend at least 10 to 15-percent less than the statutory limits in an election cycle. In contrast, challengers may spend up to 100-percent of the expenditure limit. *See* VT. STAT. ANN. tit. 17, § 2805a(c) ; *see also Landell*, 382 F.3d at 128. Thus, an incumbent candidate for Governor may spend $45,000 less than a challenger in an election cycle; $15,000 less in races for Lieutenant Governor; $6,750 less in races for secretary of state, state treasurer, auditor of accounts or attorney general; and between $650 and $200 less in races for the general assembly and county offices. *See* VT. STAT. ANN. tit. 17, § 2805a(a), (c). Even with the more generous spending allowances for challengers, however, the statute impinges their

(continued...)

advantages in an election, including name identification, increased media exposure, and use of public resources associated with the officeholder's position.[21] Expenditure limits place substantial burdens on the ability of challengers to overcome these advantages by restricting the volume of their political expression, and inhibiting them from mounting adequate challenges to incumbents.

Finally, there is no basis for distinguishing fundraising from other time-demands in a legislator's schedule. Although the premise of the time-protection argument is that government has an interest in legislators dedicating more time to officeholder duties, only fundraising is singled out as a burden on those responsibilities. This ignores countless other campaign activities, such as political party luncheons and candidate forums, which may subtract equal or greater amounts of time from an officeholder's schedule.[22] Also oddly, unlike many states, Vermont does not require its legislators to give up or limit time spent in outside

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First Amendment rights by substantially limiting what they may ordinarily be able to spend to engage in political dialogue.

[21] Examples include government websites, press releases, media advisories, and constituent or "franked" mail.

[22] *See e.g., Homans v. City of Albuquerque*, 366 F.3d 900, 912 (10th Cir. 2004) ("The claim that fund-raising prevents officeholders from engaging in alternative campaign tactics such as individual door-to-door contact is interesting. Albuquerque does not articulate any reason why there is a compelling state interest in channeling campaign resources to favor individual voter contact rather than fund-raising tactics. *There is no indication in the record that, for example, the added burden of fund-raising events and phone calls is more demanding on an officeholder's time than the burden of individual voter contact.* Nor does the record persuade us that individual voter contact is a fundamentally superior campaign strategy because fund-raising efforts compromise an officeholder's ability to communicate with the public.") (emphasis added).

employment, *see* VT. STAT. ANN. tit. 2, §§ 1-22 and JOINT RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES OF VERMONT (adopted Jan. 30, 1990), *available at* http://www.leg.state.vt.us/misc/rules2.htm, casting further doubt on the legitimacy of the "time-protection interest." At bottom, the only policy interest advanced is a circular one: it frees lawmakers from *fundraising activities*.

In sum, the time-protection interest serves only the interest of incumbent officeholders. Vermont has no compelling interest, however, in protecting the schedules of incumbent lawmakers from fundraising activities. Because time-protection is not a valid interest supporting Vermont's expenditure limits, this Court should reverse the lower court.

C. Act 64's Expenditure Limits Are Not Narrowly Tailored To Advance the Asserted Interests of Anti-Corruption and Time-Protection.

In addition to being justified by a compelling government interest, expenditure limits must be "sufficiently narrowly tailored to achieve" that interest. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990). Furthermore, a government must employ the least restrictive means possible to advance that interest. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004). In this case, even if the Court were to determine that anti-corruption and time-protection are compelling government interests justifying expenditure limitations – and they are not – Act 64 would fail for lack of narrow tailoring.

1. Act 64's Expenditure Limits Do Not Advance the Asserted Interests of Anti-Corruption and Time-Protection.

Expenditure limits are not effective in reducing the *appearance* of corruption in the electoral process. To the

contrary, Act 64 perversely *promotes* corruption because its limitation on expenditures (and hence the number of contributions that might be accepted) *increases* the significance of each individual contribution. Under a regime of contribution limits with no spending cap, the likelihood of corruption diminishes as the number of contributors increases.

Also perversely, Act 64 does not limit the total amount a candidate can *raise*; it limits only what he can *spend*. At any time of heightened interest in the legislative agenda – when the hypothetical potential for *quid pro quo* corruption is at its zenith – a legislator may decide to amass a large war chest for use in future electoral cycles or to pursue other political ambitions. Thus, the expenditure limitations may not even limit time spent fundraising during the busiest legislative periods.

Even if effective at reducing time spent fundraising, Act 64 does not ensure that incumbents will devote additional time to their official duties. For example, Elizabeth Ready, a Vermont legislator and Respondent-Intervenor in this case, testified at trial that expenditure limits would help eliminate the burdens of fundraising and enable her to campaign door-to-door, visit county fairs, and attend local events. *See Landell*, 382 F.3d at 123. Although these activities may increase person-to-person contact with some constituents, they are more accurately described as campaign activities rather than official duties.

Furthermore, expenditure limits hinder a candidate's ability to campaign efficiently using paid-communication methods such as direct mail, television, radio, and newspaper advertisements. To the extent that expenditure limits force incumbents to rely more on time-intensive personal campaigning rather than media advertising that will reach

more voters, the limits defeat the ostensible purpose of time-protection for incumbents.

2. Act 64's Expenditure Limits Are Not the Least Restrictive Means of Advancing the State's Asserted Anti-Corruption and Time-Protection Interests.

Even if anti-corruption and time-protection are compelling interests that might sustain Act 64's expenditure limits, and even if Act 64 advances those interests to some degree, Act 64 does not do so in the least restrictive manner.

First, Vermont's expenditure restrictions will demonstrably *reduce speech* because the statute's spending caps are based on expenditure *averages* from previous elections, including those that were nominally contested. *See Landell*, 382 F.3d at 173-74. By definition, many prior campaigns – usually the most competitive ones where incumbents were most at risk – cost more than the legislatively-mandated averages. Consequently, expenditures, and thus speech, in the most competitive races will actually *diminish* as a result of the arbitrary calculations. *See Buckley*, 424 U.S. at 20 (invalidating expenditure limits that "would have required restrictions in the scope of a number of past congressional and Presidential campaigns").

Second, the expenditure limit unnecessarily prohibits candidates from using their own resources. As *Buckley* forcefully ruled, "the First Amendment simply cannot tolerate [FECA's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. Just as a self-financing candidate cannot corrupt himself, his use of personal resources also does not require expenditure of time raising money from others.

Third, the legislation unnecessarily and unfairly regulates spending in *all* races by *all* candidates. To protect the time of officeholders so they may legislate and perform their official functions, it is unnecessary to limit expenditures in *open seat* contests between *non-incumbents*. Nor is it necessary to limit spending by non-incumbents running against incumbents. As noted above, incumbents have various "in kind" political advantages by virtue of holding their offices, so they would not be unduly disadvantaged by expenditure limits that applied solely to incumbents.

Fourth, other states such as Georgia, *see* GA. CODE § 21-5-35(a), have used a less restrictive time limitation on fundraising, prohibiting candidates from raising money while the legislature is in session.[23] This approach would complement Vermont's current statutory framework, *see* VT. STAT. ANN. tit. 2, § 266(3), which prohibits lawmakers from accepting contributions from *lobbyists* during legislative work periods.[24]

Finally, Act 64 is overbroad by limiting expenditures, regardless of the source of the funds. As shown (pp. 20-21 above), expenditures derived from telemarketing, direct mail, the Internet, and other non-personal forms of solicitation do not require a substantial investment of personal time from the

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[23] *See also* ALA. CODE § 17-22A-7(b)(2); IND. CODE § 3-9-2-12; IOWA CODE § 68A.504(1); LA. REV. STAT. ANN. § 18:1505.2(Q)(1), (R)(1); MD. CODE ANN., ELEC. § 13-235; NEV. REV. STAT. 294A.300, 310; N.M. STAT. ANN. § 1-19-34.1; OKLA. STAT. tit. 74, § 257:10-1-6; TENN. CODE ANN. § 2-10-310(a)(1), (b); and TEX. ELEC. CODE. ANN. § 253.034.

[24] Other states precluding lobbyist contributions during legislative sessions include Arizona, ARIZ. REV. STAT. § 41-1234.01, and North Carolina, N.C. GEN. STAT. § 163-278.13B. Moreover, states like Kansas, KAN. STAT. ANN. § 25-4153a, permit legislators to accept contributions only from *individuals* during legislative sessions.

candidate. Thus, to the extent that time-protection is a valid interest, and to the extent that Act 64 advances that interest with regard to personal solicitations, Act 64 is still overbroad because it restricts expenditures derived from non-personal solicitation sources.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to reverse the decision of the Second Circuit.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

Brief of Amicus Curiae ReclaimDemocracy.Org In Support of Respondents

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INTEREST OF AMICUS CURIAE

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Vermont residents.[1] The organization works to build a genuinely representative democracy based on the principle that citizens' ability to influence elections and government should result from the quality of their ideas and their energy and effectiveness in promoting them, independent of their financial status.

ReclaimDemocracy.org works to ensure we do not decay from a democratic republic to plutocracy. In its view, the constitutional promise of equal protection of the laws for all citizens requires we separate the opportunity to influence elections from wealth. Moreover, it maintains that the wealth discrimination of the current system results in de facto race and (to a lesser extent) gender discrimination, so "purging wealth discrimination from the electoral system is ... a civil rights issue." ReclaimDemocracy.org's work would be severely undermined were this Court to determine that the First Amendment bars states from protecting their citizens and the democratic process itself by limiting the influence of wealth on elections.

ReclaimDemocracy.org asks the Court to affirm the right of the citizens of Vermont and their legislature to place reasonable limits on campaign investments and spending in order to further the purposes of the equal protection mandate of the Fourteenth Amendment.

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[1] Letters of consent have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Vermont statute at issue in this case regulates monetary contributions to political campaigns and the amount candidates spend in order to assure Vermont's elections reflect the will of its citizens and the persuasiveness of candidates rather than the influence of domestic and foreign wealth.

Were it not for *Buckley v. Valeo*, 424 U.S. 1 (1976), Vermont's action would raise no substantial Constitutional issue. *Buckley*, however, equated money with speech and thereby introduced First Amendment principles of governmental abstention into campaign finance jurisprudence. By this misclassification, *Buckley* revived laissez-faire doctrines barring the government from protecting its citizens from the power of wealth. Its *Lochner*esque imposition of "the Social Statics of Mr. Herbert Spencer," see, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), creates an appearance of Constitutional conflict that has no basis.

Campaign contributions often are economic, marketplace transactions—purchases by individuals and business interests of "access" or "influence." Moreover, regardless of motivation, campaign contributions and candidate expenditures alike resemble economic activity far more than speech. Legislatures should be free to regulate them in order to protect our republican system of government from domination by wealth, just as they are free to create the rules for all other market transactions in order to harness the power of the market for the public good. *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938).[2] Free speech anti-

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[2] "Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis ... ." Id.

censorship principles which preserve individual liberty against overreaching power have precisely the opposite effect when extended to create special privileges for the wealthy to dominate the electoral system.

All democracies must separate the realms of two different decision-making processes. First, a political arena of equal citizenship and political democracy, characterized by the fundamental principle of one person, one vote, *Reynolds v. Sims*, 377 U.S. 533 (1964). Second, a market arena of individual decision and regulation by price, where the anti-discrimination principle of equal access to markets co-exists with necessarily unequal wealth and economic power. Indeed, the separation of the spheres of market and law is basic to the rule of law itself: Both the Fourteenth Amendment and fundamental principles of justice dating back at least to Leviticus 19:15 teach that the law should favor neither rich nor poor.[3]

In our dual system, we allow money to buy most things, but never the political system that determines the limits to what money can buy. See, e.g., *Gordon v. Lance*, 403 U.S. 1, fn 1 (1971) ("a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective").

Vermont's statute limiting the influence of money on elections is an attempt to embody these basic norms in its electoral system in order to prevent democracy from degenerating into plutocracy. It seeks to protect the autonomy of the citizenry of Vermont and to ensure equal access to the electoral process, regardless of wealth, that has long been fundamental to this Court's jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

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[3] Cf. Exodus 23:6, Deuteronomy 1:17, 16:9.

prohibiting the free exercise of the franchise"); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional).

Moreover, like *Harper* itself, the Vermont statute recognizes that the wealth distribution in our country reflects racial divisions, so serious attempts to remedy racial wrongs also must confront the power of wealth. Each of these goals is presumptively valid under our Constitutional regime of republican democracy, and the legislature's choice of means is entitled to the usual deference granted to legislatively-enacted law.

Constitutional consideration of Vermont's attempt to protect its electoral system is distorted, however, by the lingering effects of *Buckley*. Neither Free Speech values, Equal Protection principles, nor the requirements of Due Process require that Vermont ignore the problems created for democracy when private wealth dominates the public electoral system.

The Court should take this opportunity to remedy the damage *Buckley* did to First Amendment, federalism and democratic values by rejecting this flawed precedent. Money is not speech. Applying doctrines designed to protect dissent and democracy to campaign finance has the perverse consequences of entrenching incumbents, unfairly enhancing the power of those individuals and corporations with the assets to purchase access to politicians, and, consequently, diminishing public faith in our institutions of government.

The Court should clarify that objections to the particular way Vermont has chosen to protect its republican form of government should be addressed to the people of Vermont and their elected representatives, not to this Court. Courts "are not free ... to reject [legislative] views about 'what constitutes wise economic or social policy,'" *Lyng v. UAW*, 485 U.S. 360 (1988).

ARGUMENT

I. *Buckley v. Valeo*'s Classification of Campaign Expenditures as First Amendment Speech Was Erroneous and Should Be Overruled

Buckley v. Valeo, 424 U.S. 1 (1976) revolutionized First Amendment and campaign finance law alike by holding that political money is "speech" for purposes of the First Amendment. Later cases have assumed the same analysis applies as against the state legislatures, via the Fourteenth Amendment's protections against violations of equal protection and due process of the laws.

But money is not speech. A regulatory regime appropriate to speech has perverse results when applied to money. After three decades of experience, the time has come to reexamine and reject *Buckley*.

First Amendment jurisprudence usually contains a strong presumption against governmental regulation, stemming from its core meaning as a ban on governmental censorship and governmental enforcement of religious and secular catechisms. *Buckley* transformed the traditional bar against censorship into something radically different: restrictive scrutiny of legislative action meant to protect the citizenry from abuse of the rights of property.

The First Amendment's protection against censorship is a critical element of our American system of republican self-government. First, the political freedom to criticize the incumbent officials is critical to majority rule: without it, government would be too free to manipulate, rather than respond to, public opinion. Open political debate is as foundational to democratic rule as elections. Second, we have long recognized free intellectual debate, cacophonous as it often is, as the only route to avoid the stagnation of vested

interests and to encourage intellectual progress. Third, the freedom to speak on all matters, even the purely artistic, creates a realm of privacy and personal freedom in which individuals can act without concern for the opinion of the majority, thus ensuring democracy does not degenerate into a tyranny of the majority.

Buckley, however, by simplistically substituting money for speech, promoted none of these values. Purchased speech often does not enhance political self-determination, truth-seeking intellectual inquiry or personal freedom.

A. *Buckley*, like *Lochner*, has privileged the privileged by sanctifying the current distribution of wealth

Buckley's equation of political money with speech repeats the infamous error of *Lochner*. In each case, the Court purported to derive an abstract principle from the Constitution's language. It then applied it without regard to context to cut off political debate over the difficult and controversial issue of how a democratic republic should manage its economy.

Lochner's invasion of the legislative sphere stemmed directly from its basic failing. The case assumed contractual agreements between bakers and their employers reflected the autonomous will of equal bargainers, and thus legislative imposition of terms was an invasion of the rights of both parties. This was a controversial view of contract then and remains one now. Others believed the very fact that bakers were willing to agree to work long hours in unsafe conditions was sufficient evidence that they had insufficient power to function as the autonomous beings the *Lochner* court imagined. *Lochner* was substantively wrong, first and foremost, because, by assuming equality when there was none, it further empowered the powerful at the expense of the weak. "Neutrally" enforcing agreements between bullies and their victims only worsens the position of the victims.

The *Buckley* framework suffers from a similar blindness to the realities of the world and a similar invasion of the legislative sphere with similar results: Reverse Robin Hood, it takes from the common person and gives to the rich. *Buckley* imposed a *Lochner*esque "free" market view on campaign regulation, in effect telling the people they and their elected representatives may not attempt to remedy the damage done to fair political competition by the distorting power of wealth. Like *Lochner*, *Buckley* wrongly interpreted the Constitution to protect a particular understanding of the rights of property, but not to protect more important rights—the true values of the First Amendment—from being subordinated to economic power.

Buckley mimicked *Lochner* in a third way. It made a major contribution to a political/economic complex that simply does not work on the ground, regardless of whether its particular conceptualization of the law can be made internally consistent. *Buckley* underpins the corruption and collapse of American politics much as *Lochner* helped lead to the collapse of our economy. The Great Depression demonstrated for many Americans that a market economy can succeed only if it involves and benefits a wide spectrum of citizens. *Buckley*'s imposition of *Lochner*esque "free markets" on elections has, similarly, led to the exclusion of most Americans from participation in and the benefits of democratic politics. This damages the legitimacy of and destabilizes our republican form of government. We should not wait for a political equivalent to the Great Depression before reversing course.

B. Property rights and the limits placed on the use of wealth to buy influence are matters of state law, not the First Amendment

The question of how best to define the rights of property and finance elections so as to protect citizens'

political rights and republican self-government is difficult and controversial. Many Americans today believe our representative democracy needs urgent repair. Campaign finance reform lies at the controversial core of that struggle precisely because it reflects multiple conflicting constitutional values.

Elections rely on the principles of "one person, one vote" and equal access to the ballot for their legitimacy. Similarly, the American conception of a republican form of government by "we the people" demands all citizens enjoy the equal protection of the laws and equal political rights regardless of wealth. See, e.g., *Harper*, 383 U.S. 663 (1966) (invalidating poll tax); *Bullock v. Carter*, 405 U.S. 134, 135 (1972) (invalidating ballot-access fees); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating ballot-access fee). The rights and responsibilities of citizenship, like the law and its protection, cannot be for sale.

Our market-based economy has inherent tendencies to inequality and to expanding the range of items that can be bought and sold. Determining and maintaining the boundary between the realms of market and politics is a central political question in our society. How much should the legal system counterbalance market tendencies to give more to those who already have more? When should the legal system modify the rules creating the market system to price goods—such as security, social stability, or clean air—that other market-based legal rules might not? What things or rights ought not to be for sale at all?

Campaign finance reform is at the core of the great debate over the proper place of the market in a democratic republic. Under our Constitutional system, government cannot be for sale, nor can politics be reduced to a marketplace. But even equal access to the ballot "does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *McConnell*

v. Federal Election Comm'n, 540 U.S. 93, 227 (2003). Instead, these are issues for legislative determination.

Advertising works, and more advertising than the competition generally works better. Otherwise, campaign finance would be of little interest. Of course, well-financed candidates sometimes lose, just as fine advertising campaigns cannot always make up for poor products. The Edsel has its political analogues. In general, however, participants in our campaign system assume voters, like consumers, often can be influenced or persuaded to act as marketers wish. Thus modern campaigns are about buying votes, even when *quid pro quo* bribery is not in the picture.

Because money matters, the equal protection principles of our republic are challenged deeply by any system allowing unfettered use of private resources to influence public political campaigns. Equal citizenship becomes meaningless when donors, not voters, become politicians' major constituents or when candidates can run for office only if backed by institutional or individual wealth.

The *Buckley* framework fails because it does not recognize, let alone confront, the central issues of campaign finance reform. The First Amendment bars censorship, both to preserve the freedom of citizens to dissent from the majority and to preserve the integrity of our political system by preventing any incumbent government from molding the citizenry into its supporters. But ours is a government of the people, not of the dollars. Our politicians should be responsive to citizens' opinions backed by their voting power, not to their wealth backed by their purchasing power.

Contrary to the implication of *Buckley*, our First Amendment nowhere states that wealth has a Constitutional claim to buy governmental access and influence. Instead, *Buckley*, like *Lochner*, simply imposed a discredited interpretation of "free markets" on an unwilling nation.

Freeing wealth does not free citizens. Ordinary citizens are not freer if wealthy individuals and institutions can dominate the public discourse or obtain privileged access to the corridors of power. On the contrary, the democratic system is deeply distorted. The distortion is only worsened by the fact that much of our wealth is corporate owned, controlled by fiduciaries who are required by state law and market pressure to use it for only limited purposes without regard to any citizen's view of the public good.

In the end, *Buckley*, like *Lochner*, failed because the complex and often fact-dependent issues of appropriate economic regulation cannot be resolved intelligently based on interpretation of abstract notions of free markets imposed by the Court on our Constitution. A First Amendment seeking "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), requires the rules of electoral competition be structured to open politics to all citizens. Instead, *Buckley* reduces most citizens' participation to choosing from a menu predetermined by those who hold the real power in elections today—organized interests comprised of large donors.

C. Speech and political regimes are radically different from market and economic regimes

Our collective decisions result largely from two radically different processes: politics and economics. Our politics are founded in a basic concept of equal citizenship, enshrined in the guarantees of the Fifth Amendment and Fourteenth Amendment of due process and equal protection and vindicated by this court in its voting rights cases. Most political decisions are made by the people's elected representatives, subject to limitations on the scope of collective decision-making designed to preserve a sphere of

private freedom.

The religion, speech and press clauses of our First Amendment protect both this sphere of personal autonomy and the democratic process by a common core principle: No censorship and no mind control. American concepts of freedom bar our government from coercing the citizenry to agree with or support the current powers-that-be, whether political or religious.

Freedom of speech is, in its core, a negative right—a bar on governmental action that, by its nature, lends itself to absolutes. This is particularly true in light of the Court's role in protecting the system and procedures of democracy even when temporary crises may make governmental officials, or even the population as a whole, think it expedient to sacrifice them in the name of security, stability or other important values.[4] As Jefferson put it, in condemning the Alien & Sedition Acts: "[L]ibels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."[5]

Economic decision-making is dramatically different

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[4] See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As the Court said in *Virginia v. Black*, 538 U.S. 343 (2003): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374, (1927) (Brandeis, J., concurring) (some internal citations omitted).

[5] 4 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 541 (1876), quoted in *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 157 (1973) (Douglas, J concurring).

from political decisions. Most importantly, economic decisions are made on the radically different basis of purchasing power. Additionally, collective economic decisions are made, at least in the first instance, by the market's aggregation of many individual decisions, with none of the collective debate, voting or reasoned principles that characterize political, bureaucratic and legal governmental decisions. As a result, under the right circumstances, market decision-making can be both more conducive to individual choice and more likely to lead to economic growth.

The line between democratic and market decision-making, however, must be drawn by the democratic process. Votes, not wealth, must remain the ultimate source of legitimacy in a democracy. Ours is a republic of people, not dollars, based on equality of citizenship, not equality of dollars.

Since at least the Great Depression we have recognized that one of the great tasks of government is to define the rules and limits of markets to ensure the "invisible hand" of the markets work for the good of all. The meaning of the "good of all," and the necessary compromises that must be made between sometimes-conflicting goals of economic growth, security, equality, decency and stability are often the central issues of politics. No constitution, and certainly not ours, which predates the modern economy, can remove such issues from ongoing political debate. The First Amendment model of governmental inaction is simply inapplicable.

D. Money can buy speech, but it is never speech itself

Citizenship is equal, but wealth is not. Indeed, the distribution of wealth in our society is extraordinarily unequal, with 1% of the population controlling approximately 40% of the total financial wealth of the

country in 2001, while half the population controls only 1% of the wealth.[6] If money is allowed to unduly influence votes, democracy descends into plutocracy.

The ability to speak and persuade is not, of course, equal and could not be in any decent society. But that inequality is limited by the range of human abilities. The inequality of audience is, in the ordinary marketplace of ideas, related to the persuasiveness of the speaker's ideas.

Purchased advertising is different. A candidate with sufficient funds can buy talent he or she lacks, buy attention that the candidate's ideas or eloquence would not command on their own merits, and multiply his or her presence beyond the possibilities of merely human abilities.

E. In its interpretation of the First Amendment, *Buckley* reverted to the discredited notion that the Constitution mandates laissez-faire economic policies

After the Great Depression and the demise of *Lochner*, Americans rejected the notion that government should, or even can, stand apart from economic affairs. Market-based capitalism requires an elaborate infrastructure of property, contract, anti-trust, anti-fraud, environmental protection and civil rights law, all of which are subject to the ordinary ebb and flow of political debate and legal change. Acknowledging this reality, the Court belatedly acknowledged it had exceeded the bounds of its legitimacy in preventing the political branches from debating the preeminent issue of democratic politics in a market economy. The New Deal "switch-in-time" acknowledged the issue of

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[6] Edward N. Wolff, *Working Paper No. 407: Changes in Household Wealth in the 1980s and 1990s in the U.S.* (2004) at 7 and Table 2. Financial wealth excludes owner-occupied housing and pension wealth and is therefore a reasonable proxy for wealth available for political purposes. Id. at 4. Income is less unequally distributed than wealth, but even so, the top 1% of families control about 20% of all income. Id. at 8.

how to structure the rules of property and market cannot be constitutionally ordained for all time—in part because property exists only within a constantly changing regulatory regime. Instead, the proper structuring of property rights is—legitimately—the subject of hard-fought political battles and necessarily temporary victories to be reexamined with changes in the economy and political mores.

Buckley's interpretation of the First Amendment to generally preclude explicit regulation of campaign-related economic activity—the direct and indirect purchase of advertising and similar media access—worked an inappropriate revival of *Lochner*. Constitutional principles require respect for the political process, see *Carolene Products*, 304 U.S. at fn. 4, just as they require respect for property rights. They do not require the State of Vermont to privilege further the already privileged by allowing the wealthy to purchase political access or influence not affordable to the rest of us. Nor do they sanctify property rules created for other purposes when they conflict with the needs of self-government.

No democracy can long survive if access to power can be bought. In an era in which special interests represented by K Street lobbyists are widely viewed as having influence on the national legislative process far beyond their voting strength, *Buckley* stands as a practical and ideological obstacle to this republic's self-preservation and self-definition.

II. Constitutional Bars on Campaign Finance Reform Do Not Promote First Amendment Values

"The First Amendment is a rule of substantive protection, not an artifice of categories." *Alexander v. U.S.*, 509 U.S. 544, 565 (1993) (Kennedy, J. dissenting). Vermont's law is not censorship and does not run afoul of

either of the two most important First Amendment values.

First, so long as campaign finance reform does not discriminate based on viewpoint or other improper bases, it does not restrict the sphere of privacy in which citizens may worship, study, think, write and express themselves as they see fit without legal requirement to consider the views of the majority or the last electoral victors.

Second, limitations on the amounts candidates may raise or spend do not, unless taken to an extreme, threaten the free political discourse which underpins any democratic or republican government. On the contrary, by freeing politicians from the necessity to adapt every statement to the needs of potential donors, expenditure limits allow politicians to debate more openly the good of the country or the desires of the marginal voter.

It is a matter of legislative judgment whether a political debate is more likely to be effectively held (1) under procedural campaign finance rules that ensure fair opportunities for all participants in a manner analogous to Robert's Rules of Order; (2) in a free-for-all governed primarily by property rules created for different contexts and the particular distribution of wealth and access to private means of publicity they create; or (3) by some other set of rules altogether. The First Amendment mandates government neutrality as to content and a governmental commitment to open debate, but not any particular form or style of debate. *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (upholding "time, place and manner" restrictions).

Many reformers believe that, ideally, a democratic society committed to equal citizenship and active political debate would provide open fora in which debate could take place—for example, by federal mandate that licensees of the public airwaves provide broadcast time to candidates without

charge. Others prefer to have candidates purchase broadcast access on the same terms as commercial advertisers, with or without state funding and with varying degrees of control over private funding. Still others, undoubtedly, believe preserving the power of the market is the most important value to be vindicated in setting campaign finance rules.

These debates, however, belong in our legislative branches because they are debates about how most effectively to govern, not about the meaning of the Constitution. The details of campaign finance reform require legislative judgments which should be left to legislatures except in extreme circumstances. The primary role for the Court is not to police restrictions on monetary expenditures under the guise that they are "speech." Instead, it should act to bar extreme legislative schemes that might violate the basic democratic values of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 337 U.S. 533 (1964), such as when a legislative scheme racially discriminates, or is designed to favor certain parties or incumbents to such an extent as to "unconstitutionally den[y a group] its chance to effectively influence the political process." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); cf., *Mobile v. Bolden*, 466 U.S. 55 (1980) (upholding multi-member districting scheme even against claim that at-large voting without proportional representation discriminates against minorities).

A. Unlimited campaign expenditures violate Fourteenth Amendment principles of political equality

Buckley conflicts with equality principles as well as democratic republican ones. The First Amendment applies to the State of Vermont only by virtue of the Fourteenth Amendment's promise of "due process" and "equal protection of the laws" to every citizen. Yet *Buckley* perpetuated precisely the opposite of political equality: an unfair, racially biased system in which political equality is

subordinated to the dramatic inequality of wealth in America.

The distribution of wealth in America is increasingly skewed.[7] Moreover, the small minority controlling the bulk of our wealth does not reflect the racial and ethnic diversity of our country. *Id.* Any policy which, like *Buckley*, protects and increases the privileges of wealth also, necessarily, slows the process of setting historic discrimination behind us.

Under the peculiar regime of *Buckley*, wealthy individuals and institutions (whether or not citizens) have a constitutionally protected interest in using their wealth to distort the equality principle in American elections. This is backwards. The Fourteenth Amendment's promise of political equality ought, instead, to mean states have the authority to restrain the rights of wealth to purchase ever-expanding power.

Although the Fourteenth Amendment bars our state governments from creating classes of citizens, *Buckley* requires states to provide extraordinary justification for measures designed to level the political playing field and provide equal access to the electoral machinery to all citizens. Rather than promoting equal protection of the laws, *Buckley* further privileged the already privileged.

B. Unrestrained campaign spending may tend to entrench incumbents, contrary to the First Amendment goal of encouraging self-government

The self-determination goal of the First Amendment is meant to protect our ability to control incumbent legislatures. *Buckley*, however, fostered an incumbent protection regime by limiting the extent to which legislatures can regulate political money.

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[7] See, e.g., EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA (1996).

Vermont could reasonably conclude that incumbents can raise money more easily than challengers because incumbents have more influence to sell to economically-driven donors who see contributions as profit-maximizing purchases of access to the regulatory regime.

1. Advertising displaces political discourse

Campaign expenditures buy advertising. Given the vast sums politicians and business corporations spend on advertising, a legislature reasonably could conclude advertising, in turn, affects campaign results independent of the underlying merits of the candidates. To be sure, Americans are not vending machines, responding mechanically when a coin is inserted. More spending does not guarantee election any more than it guarantees successful product launches. But American ingenuity has long relied on advertising to create positive images that may have little to do with underlying reality, to influence news coverage and to use people's semi-conscious desires to manipulate their behavior. This is a fine way to sell products, but a legislature is entitled to conclude that citizens determining the future of their country should debate in a context free of excessive manipulation.[8]

When money buys advertising, and advertising replaces actual political debate, First Amendment values suffer. Democracy is endangered when the techniques of Madison Avenue replace those of reasoned or impassioned debate. Advertising can overwhelm intelligent debate if even non-purchased debate begins to look like a Madison Avenue production, or the media cover political elections as if they

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[8] The importance of money in politics is increasing at a startling rate. Between 2000 and 2004, total spending in Congressional races increased by one-third. Gary Kalman & Adam Lioz, U.S. PIRG Education Fund, *Raising the Limits 2006* (Feb. 2006) at p. 23.

were referenda on the quality of the advertisements rather than candidate positions.

Political discourse does not exist in a vacuum. Rather, it is a continuing dialogue among citizens attempting to find a way to live together—expressing their common values and compromising or tolerating their differences. The influence of wealth and advertising distorts this process and makes it less likely to achieve a result that all citizens can live with.

2. Money can buy the appearance of credibility and thereby credibility itself

Significantly, this artificial, purchased, multiplication and dissemination of advertising is likely to create an aura of credibility that the candidate and the candidate's ideas may not be able to achieve on their own.

Popularity breeds popularity for rationally explicable and sound reasons. People frequently rely on other's judgments as a preliminary filter of what merits attention and a check on or confirmation of their own judgments. Widely distributed ideas, popular artists and successful celebrities have been seen and judged worthwhile by many independent viewers, editors or consumers, making it more probable that they are worth our attention. If we agree with the general view, other people's positive judgments confirm that our own were not mere lapses, while if we disagree, ordinary humility suggests that if many people have come to the contrary conclusion, perhaps we need to reconsider.

Advertising can distort this rational process by allowing a candidate with access to wealth to mimic success in this filtering contest without actually having to succeed. Money can buy the appearance of the level of support that makes a candidacy serious. It can buy the repetition that can make a specious charge or an extreme argument seem

plausible and ordinary. With enough funds, a candidate can buy a "bandwagon" that less-involved voters will see as worth joining simply because it exists.[9]

3. Candidate expenditure does not reflect preexisting support

Buckley appears to have assumed that fundraising is a proxy for popularity, depth of commitment among supporters or soundness of ideas. Were this assumption correct, advertising would be less likely to be a distortion of the electoral system and therefore less troubling: rather than substituting wealth for talent or experience, it would simply amplify existing difference in support.

Unfortunately, the assumption that spending reflects support is deeply implausible. Given our highly unequal wealth distribution, a modest contribution from an American citizen in the middle of our wealth distribution may indicate a stronger level of support than a far larger contribution from a wealthy person. The median net worth for the roughly 42 million households in the bottom 40% of Americans is $5000 including home equity. Some 338,000 households, in contrast, had net worth exceeding $10 million.[10] Several candidates in recent years have had even greater individual wealth. With this degree of disparity, Jesus' teaching about the widow's mite is truer than ever: small contributions from ordinary people often may reflect more support than large

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[9] See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11 (Daniel Kahneman et al. eds., 1982) (describing availability heuristic).

[10] Figures from Wolff (2004), supra n. 5, at table 2. Wolff's numbers are for 2001, using 1995 dollars. Wealth calculations are difficult and other methods generate somewhat different results. However, the details are not important; all observers agree that the American economy generates extraordinary wealth and distributes it extraordinarily unequally.

ones from the wealthy.[11] Reflecting this gap between support and ability to give, fewer than one-tenth of one percent of the voting age population gave $1000 or more to any congressional candidate in 2002. Yet funds from that tiny sliver of the public comprised the majority of all individual candidate contributions to those candidates.[12]

4. Business donors are purchasing services, not speaking

Many of the largest campaign contributions in our system are not statements of political positions at all. Rather, they are economically motivated investments—often from business corporations, their political action committees, or their employees—to advance the economic interests of their institutions. Investing in political decision-makers often is a highly effective way of increasing private profit: small changes in regulations, taxation or allocations can mean windfalls to particular companies or their competitors.

When donors are profit-maximizers or fiduciaries required by corporate law to set aside their political views of the good of the nation, contributions and related expenditures will flow in support of three types of politicians.

First, the rare, actively corrupt politicians who sell their influence. This Court has repeatedly recognized that the people have a compelling interest in barring this type of *quid pro quo* contribution. E.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). But *quid pro quo*

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[11] Mark 12:43-44, Luke 21:3-4. Modern economists refer to Jesus's insight as the "diminishing marginal utility of money": a dollar is worth far more to those who depend on it for basic necessities than for those who have more than they could ever spend.

[12] Adam Lioz, U.S. PIRG Education Fund, *The Role of Money in the 2002 Congressional Elections* (July 2003), p. 4.

contributions already are illegal and, presumably, most candidates have enough sense to avoid them.

The second option for profit-maximizing political investors is to fund politicians whose views generally favor the narrow economic interests of the donor. But most of the time, economic concerns of lobbyists are unlikely to be sufficiently salient to the general public (or candidates) to allow this type of maneuvering. The National Rifle Association or MoveOn.org can seek to fund candidates based on issues of concern to those groups, but most businesses cannot. Few candidates are likely to run on a platform openly favoring crony capitalism, pork barrel spending, corporate subsidies, or supporting an end to the environmental, securities, tort or civil rights laws that protect citizens' rights and direct the pursuit of private profit towards the public good. Moreover, some business managers are less likely to see their duty as promoting handouts to business *in general* than in finding the *particular* tax break, regulatory change or pork barrel project that will help the balance sheet of their particular firm. For that project, the candidate's general views are of little help.

This leaves a third, and quite disturbing, possibility. Businesses seeking to purchase political favors may fund candidates in the hope that implicitly—if not explicitly and illegally—the candidate will feel some obligation of reciprocity. Decent people, after all, typically return courtesies with courtesies and favors with favors without keeping exact track or using *quid pro quo* calculations. This is what is known in the industry as "buying access."

For a corporate executive, funding candidates who may be more sympathetic to the type of handouts or regulation that management believes will improve the firm's profits may well be good business, but it is not political participation that warrants First Amendment protection. The same is true of campaign contributions made to "buy access"

in order to allow a firm to lobby for legislative or regulatory details that will be invisible to the general debate.

The proper scope of regulation is a political issue that should be resolved by citizens and their representatives in response to political debate and voting power—not put up for auction to the highest bidder by politicians who view donors rather than voters as their key constituency. The businesses that are subjects of this debate ought not to control it—particularly when they, as in the case of our publicly traded corporations, are legally structured so as to bar them from considering the welfare of the system as a whole. Cronyism that is profitable for particular businesses in the short run may be destructive to our market system as a whole in the long run.

5. Expensive campaigns entrench incumbents, making them more able to raise the funds necessary to continue their entrenchment

Investor-donors interested in buying access or influence rationally will direct most of their money to incumbents, and especially to those incumbents able to influence economically important legislation. Incumbents have more to sell.

The more expensive campaigning becomes, the more important this incumbent fundraising advantage becomes. In a self-reinforcing system, the greater the incumbent's advantage, the more likely the incumbent is to be re-elected and, consequently, the greater the influence the incumbent has to sell.[13] In short, money attracts money and thus further

[13] In state races in the 2004 cycle, incumbents raised 58% of the total funds. Institute on Money in State Politics, *State Elections Overview 2004* (Dec 2005), p. 2, available at http://www.followthemoney.org/. The incumbents' advantage in Federal House and Senate raises was even more extreme: incumbents outspent challengers by 4.6 to 1 in 2004. Kalman & Lioz, *supra* n. 8, at p. 23.

distorts the system.

Buckley and its progeny have recognized the public's interest in eliminating both the actual purchase of political influence (corruption) and its appearance. But *Buckley*'s understanding of corruption is too limited. The First Amendment's guarantee of freedom of speech does not bar a state legislature from concluding that the detrimental effects of influence peddling extend well beyond *quid pro quo* corruption. Donors seeking to purchase political influence find legal ways of doing so; politicians seeking election or reelection fear the consequences of being outspent by a competitor; and as campaign expenditures spiral ever upward, politicians and donors alike find more creative ways to buy and sell access that should not be for sale.

First Amendment jurisprudence is based on the premise that unlimited speech promotes democratic government, by allowing criticism of incumbents and promoting discussion of alternative ideas. Unlimited campaign expenditures have the opposite effect: Incumbents are more able to raise large campaign chests because they are more likely to have the access and influence that most donors seek to purchase.

The need to attract wealthy donors reduces the ability of candidates to take positions in the public interest instead of their donors' and thus reduces the range and quality of candidate positions. Even when multiple viable candidates are able to raise the funds necessary to contend in our increasingly expensive campaigns, to raise the necessary funds they must share a fundamental commitment to appeasing donor interests. A state legislature is entitled to conclude that low voter turnout both reflects popular dissatisfaction with the status quo and is a problem that could be remedied by limiting the influence of wealth on campaigns.

Judge Winter's dissent below fails to recognize that, when selling access is the game, incumbents have an enormous advantage. The First Amendment's guarantee of free speech offers insufficient guidance to allow courts to displace legislative judgment as to the relative harm of "sale of access" or limits on buying name recognition through advertising. Nor would any free speech value be promoted by inventing a new constitutional right to purchase name recognition. When purchases, rather than speech, are the issue, *Buckley*'s metaphors of First Amendment abstention become *Lochner*'s unjustifiable enforcement of unfettered laissez-faire in the name of the Constitution.

CONCLUSION

Speech is not money. *Buckley* was wrong to impose a rigid First Amendment-based analysis on the complex problems of campaign finance reform. After thirty years, it is clear that *Buckley* followed the mistaken path of *Lochner*, imposing an artificial classification on the world without any basis in Constitutional text or values. For us to remain free, the "free market of ideas" must maintain its independence from the "economic market". The First Amendment, which applies to the states only by virtue of the Fourteenth Amendment's egalitarian commitment to equal protection and due process for all citizens, should not be distorted from a protector of democracy into the enforcer of a new plutocracy's grip on the political process.

This case involves less the First Amendment than the right of a state to attempt to further democracy and good government via economic regulation. Lochner's failure taught us that economic markets can be free if surrounded by politically-controversial legislation; campaign spending reform is precisely that kind of freedom-enhancing economic regulation. It should be analyzed under the fundamental Federalist principle that states create the rights of property

and their limits; under the Equal Protection principle that all citizens, whether rich or poor are entitled to have their vote given equal weight, and under the Republican Form of Government clause, *U.S. Constitution, Art. IV, § 4*, committing this nation to a government of the people, by the people and for the people—not of wealth, by wealth and for wealth.

In the absence of statutes like Vermont's Act 64, politicians must be inordinately concerned with the views of funders rather than voters. Moreover, successful fundraisers often avoid the spirit if not the letter of campaign finance regulations, leading to a general aura of sleaze. One consequence is that the *Buckley* framework gives independently wealthy politicians a double-edged advantage: they can outspend their opponents while maintaining the independence that used to mark statesmen when campaigns were cheaper. Unlimited campaign spending, far from preserving First Amendment values, corrupts our electoral process.

The Court should take this opportunity to disavow *Buckley* and uphold Vermont Act 64 under its ordinary voting rights jurisprudence.

Respectfully submitted,

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Nos. 04-1528 and 04-1530

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF SENATOR JOHN F. REED, SENATOR THOMAS R. CARPER, SENATOR MARK DAYTON, SENATOR RICHARD J. DURBIN, SENATOR DIANNE FEINSTEIN, SENATOR TOM HARKIN, SENATOR EDWARD M. KENNEDY, SENATOR CARL LEVIN, REPRESENTATIVE CHARLES F. BASS, REPRESENTATIVE MICHAEL N. CASTLE, REPRESENTATIVE JAMES A. LEACH, REPRESENTATIVE TOM OSBORNE, REPRESENTATIVE TODD RUSSELL PLATTS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICI

Amici, Senator John F. Reed, Senator Thomas R. Carper, Senator Mark Dayton, Senator Richard J. Durbin, Senator Dianne Feinstein, Senator Tom Harkin, Senator Edward M. Kennedy, Senator Carl Levin, Representative Charles F. Bass, Representative Michael N. Castle, Representative James A. Leach, Representative Tom Osborne, and Representative Todd Russell Platts are a bipartisan group of Members of Congress.[1] The personal experiences of *amici*, as candidates and members of Congress, since this Court's decision in *Buckley* demonstrate the need for clearer and more comprehensive authority to vindicate the central premise in *Buckley*—that the government has a compelling interest in ensuring faith in the integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both elected representatives and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), properly accorded legislatures such deference with regard to contribution limits. The Court should clarify that equivalent deference is warranted with respect to the expenditure limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public's faith and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy. Indeed, such reforms will enhance the

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the clerk.

public debate that is the foundation of our democratic process.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues of great significance. In the judgment of *amici*, the Second Circuit's decision upholding the State of Vermont's campaign contribution limits, and, in particular, its holding that the State had identified compelling interests sufficient to support its campaign expenditure limitation, were exactly right. In both of these critical respects, the Second Circuit correctly held that Vermont's campaign finance law is consistent with the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

As the Court recognized in *McConnell v. FEC*, 540 U.S. 93 (2003), nothing in the three decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. Rather, the accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics continues to threaten the public's faith in the legitimacy of government and in the elections that choose whom shall govern—notwithstanding the existence of contribution limits of the kind upheld in *Buckley*. *See McConnell*, 540 U.S. at 143-65 (relying on empirical evidence and experience of Members of Congress). Indeed, in *McConnell* the Court stressed the "importance of the interests that underlie contribution limits—interests in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." 540 U.S. at 136 (quotation marks omitted).

As the Court explained in *McConnell*, "these interests directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." 540 U.S. at 136-37 (quotation marks omitted). "Contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." *Id.* at 137. The issues presented in this case are thus simply not about censorship. To the contrary, "constitutionally protected interests lie on both sides of the legal equation." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). For this reason, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *McConnell*, 540 U.S. at 137 (quotation marks omitted).

The Court in *McConnell* made those statements in the course of upholding contribution limitations, and the analysis set forth in that case compels the conclusion that Vermont's campaign contribution limitations should be upheld in this case. Even more importantly from the perspective of *amici*, these core teachings of *McConnell* and *Shrink Missouri* should also apply to the question of whether Vermont's campaign expenditure limitations are constitutional—notwithstanding *Buckley*'s different treatment of contribution and expenditure limitations. Specifically, *amici* believe *Buckley* can and should be read to provide government with the leeway to impose expenditure limitations if supported by a record of compelling state interests sufficient to support the limitations. As the Second Circuit recognized, there is no rule of *per se* First Amendment invalidity. Even if expenditure limitations are subject to strict First Amendment scrutiny, the interests Vermont advances in support of its

limitations—controlling the corrosive effects of around-the-clock fund-raising, both on the public's faith in the institutions of government and on the ability of officeholders to do the people's business effectively—are interests that must be recognized as compelling after *McConnell*. At the very minimum, therefore, the State should be afforded the opportunity to demonstrate that its expenditure limitations are a narrowly tailored means of achieving these goals.

Even more to the point, *amici* believe *Buckley*'s approach to expenditure limitations is ripe for re-examination in light of the three decades of experience under the regime of campaign finance regulation that *Buckley* dictated. Applying the equivalent of strict judicial scrutiny to expenditure limitations is inappropriate, and leaves government with insufficient leeway to protect the integrity of the political process.

The needed leeway can be provided, consistent with the First Amendment, in two ways. First, intermediate scrutiny should apply to any campaign finance reform—including expenditure limitations—that is justified by reference to something other than the communicative impact of speech. That is the clear thrust of this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989). Unlike the expenditure limitations at issue in *Buckley*—the principal justification for which was a desire on the part of the government to limit the speech of some to amplify the relative voice of others—Vermont enacted its expenditure limits to advance interests properly understood as content-neutral. Vermont's goals of ensuring the public's faith in the integrity of the political process and ensuring the effectiveness of that process are completely unrelated to the

communicative impact of campaign speech. The State's goal is not to suppress any speech or to reduce the quantity of political speech. Rather, the State seeks to change the current reality in which fund raising is the predominant activity of politics.

Second, and more generally, *amici* believe that legislatures should be given substantial deference in the design and enactment of campaign finance laws—including expenditure limitations. *Buckley* provided such deference with regard to contribution limits, and the practical experience of *amici* since *Buckley* with respect to the financing of campaigns has demonstrated that deference is warranted for all such laws. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what campaign finance laws are needed to sustain faith in the electoral process and enhance the process of governance. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). Appropriate deference is not inconsistent with meaningful scrutiny to ensure that campaign finance laws are not incumbency protection devices in disguise.

In sum, *amici* believe that this Court's interpretation of the First Amendment should not hamstring legislators' good faith attempts to protect the viability of our very structure of

government. "[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

ARGUMENT

I. The Second Circuit's Disposition of Petitioners' Challenge to Vermont's Campaign Spending Limitations Was Correct.

As the Second Circuit recognized in this case, *Buckley* should not be read as imposing an inflexible bar on campaign spending limitations. Reading *Buckley* that way would be anomalous in First Amendment jurisprudence. Even direct content-based restrictions of speech may be sustained if they are a narrowly tailored means of achieving a compelling governmental interest—a point the Court has vindicated directly in the context of the electoral process in *Burson v. Freeman*, 504 U.S. 191 (1992). Thus, where—as here—government can demonstrate the existence of compelling interests in support of campaign expenditure limitations, those limitations should be sustained if they are an appropriately narrowly tailored response to the problem that motivated their enactment.

With respect to Vermont's expenditure limitations, therefore, the Second Circuit's disposition was correct under existing law. The court below correctly held that the interests the State has advanced in support of the expenditure limitations are compelling, and remanded for a determination whether the law was sufficiently tailored to survive review. Petitioners are incorrect in their contention that *Buckley* foreclosed that result. *Buckley* invalidated the federal

campaign expenditure limitation at issue in that case because that limitation was principally justified on the basis of a perceived need to reduce the speech of the wealthy in order to equalize the relative voice of the less affluent—*i.e.* by an express desire to restrict the speech of some in order to provide a comparative advantage to others. 424 U.S. at 48 & n.54. Thus, even if the parties debated the sufficiency of other justifications for expenditure limitations (including those advanced by Vermont here), *Buckley* cannot reasonably be read as rejecting those alternative justifications as inadequate. This is a fundamentally different case than *Buckley* because the justifications Vermont advances here have nothing to do with a desire to equalize the relative voices of speakers. Vermont simply wants to ensure that fund-raising is no longer the predominant activity of politics. As the Second Circuit correctly held, Vermont's justifications should be evaluated on their own terms, and qualify as compelling.

II. Vermont's Campaign Expenditure Limitation Is Properly Subject to Intermediate First Amendment Scrutiny.

Although Vermont's expenditure limitation should be upheld under *Buckley*'s articulation of the appropriate standard of review, *amici* submit that a more searching re-examination of *Buckley*'s analytical framework is needed to bring the Court's approach to campaign finance cases into line with its overall First Amendment jurisprudence. This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of reviews for laws challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on

the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient—but still searching—requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (internal quotation marks omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation marks omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not [on] others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for regulating is unrelated to the content of the expression, limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[2]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, campaign finance laws should be subjected to intermediate scrutiny if they are justified on grounds unrelated to the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to

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[2] The mere fact that campaign finance laws only address laws related to campaign financing does not mean such laws are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (quotation marks omitted).

the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3] Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law aims at the communicative impact of the speech affected.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws—including expenditure limitations of the kind at issue here. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of

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[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 528 U.S. at 386 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government's justification that is controlling. *Ward*, 491 U.S. at 791.

representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); alteration in original); *see also McConnell*, 540 U.S. at 203-04 (reaffirming compelling interest in preserving citizenry's faith in the electoral process).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by a public perception of the pervasive influence of money in politics. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. International Union United Automobile Workers of Am.*, 352 U.S. 567, 575 (1957).

Additionally, reforms—and expenditure limits in particular—can be justified by a compelling content-neutral interest in preserving the quality of representation by eliminating the burden of raising enormous campaign "war chests." That this burden exists, and has come to dominate

the professional lives of officeholders and candidates is not open to serious question. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

As *amici* can attest, the incessant demands of fund-raising create significant problems for elected representatives seeking to fulfill their professional duties. Elected officials spend so much time raising campaign funds that there is little time left to master issues, communicate with constituents and perform other essential parts of their jobs. In the words of former Representative Vin Weber, "the amount of time people have to put into raising money is a serious problem in the country. . . . There's no way you can prove its impact on the quality of Congress's work . . . . But when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work."[4] This interest is not merely important: it is of a constitutional dimension in its own right. In addition, the necessity of amassing a huge campaign "war chest" creates a strong disincentive to run for office, for both incumbents and challengers.

This problem is the direct result of the absence of limits on campaign spending—and not the result of campaign contribution limitations, as petitioners and their supporting *amici* contend. Candidates simply will not voluntarily put themselves at risk of being outspent by an aggressive opponent. Thus, in a world without contribution limits, the pressure to engage in constant fundraising would remain

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[4]Center for Responsive Politics, *Speaking Freely*, at http://www.crp.org/pubs/speaking/speaking03.html (visited Feb. 7, 2006) (alterations in original).

intense. In any event, petitioners and their supporting *amici* are plainly wrong in their contention that the only constitutionally acceptable way to advance the compelling interest in reducing the time spent fund raising is to eliminate contribution limits. That choice would force legislatures to endure the risk of actual and perceived corruption of the electoral process in order to reduce the incessant demands of fundraising. The First Amendment cannot be read to require such a perverse result.

These justifications for reform address public concerns wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

III. The Court Should Afford Appropriate Deference To Legislative Judgments That Campaign Finance Laws—Including Expenditure Limitations—Are Necessary.

More generally, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance laws. In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). That wisdom applies with particular force in the present context. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 548.

This deference has been applied to laws regulating the electoral process even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the

voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); alteration in original). There, the Court affirmed a campaign reform, even in the face of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is warranted in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to access. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that

donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem [was] not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained.*" *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest). The Court made the same point in *Shrink Missouri.* Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 528 U.S. at 391. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason

to question the existence of a corresponding suspicion among voters." *Id.* at 395.[5]

This deference is appropriate, and should be afforded here. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. And the regime *Buckley*

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[5] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 393-95.

put in place has had the perverse consequence of burdening officeholders and candidates with the ceaseless task of fund-raising to ensure adequate war chests—a burden that is eroding the quality of representative government in this country even as it erodes the public's faith in their elected officials. At the same time, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests on the other side of the balance. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*

Respondents/Cross-Petitioners.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents/Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, NEW MEXICO, OREGON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether the state interest in combating the public perception of corruption and distortion in the electoral process caused by unlimited campaign spending may sustain narrowly tailored expenditure limits against a First Amendment challenge.

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INTEREST OF THE *AMICI CURIAE*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire; Rebecca Vigil-Giron, Secretary of State of New Mexico; Bill Bradbury, Secretary of State of Oregon; and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their respective States. This responsibility gives them extensive experience with the issues raised in this case.

This case involves a challenge to amendments to Vermont's campaign finance laws – including a limit on campaign expenditures – that were enacted in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. See *Landell* v. *Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments were enacted to serve what the Second Circuit described as "at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the district court in this case found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals. *Id.* at 116-125. For Vermont, at least, meaningful reform can occur only with the implementation of mandatory spending limits.

Amici submit that affirmance of the Second Circuit's decision upholding Vermont's law is essential if state and local governments are to have the tools that are necessary to protect the integrity of the electoral process. *Amici* believe that

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), is not properly read to establish a *per se* prohibition on mandatory campaign spending limits. But if *amici* are incorrect in that view, they urge the Court to reconsider that decision and permit Vermont to demonstrate that its campaign expenditure limits should survive strict scrutiny. A decision by this Court that the Constitution does not erect an insuperable, *per se* barrier to campaign spending restrictions will assist the states, as laboratories of democracy, in addressing widespread public dissatisfaction with the current system of electioneering – a dissatisfaction that is having a corrosive effect on the citizenry's faith in the democratic process and is discouraging voters from participating in state elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Vermont officials and their other *amici* address the governing constitutional doctrine, explaining why the First Amendment should not be understood to preclude absolutely the enactment of campaign expenditure limits. *Amici* Secretaries of State will not repeat those doctrinal arguments here. Instead, *amici* will address two points of great concern to public officials with responsibility for the integrity and vitality of state electoral systems: (1) unlimited campaign expenditures undermine public confidence in the electoral process, and thus in the democratic system itself; and (2) state and local experimentation with differing methods of campaign finance regulation may help in the development of effective solutions to this profoundly vexing problem.

Amici urge the Court to uphold the constitutionality of Vermont's mandatory campaign spending limits, thus allowing state legislatures to employ this kind of tool as they seek to address constituent concerns regarding the corruption (real and perceived) and distortion of the political process that are attributable to the unlimited campaign spending. The case for so equipping state legislatures is compelling. Public dissatisfaction with the current system of campaign finance is at an alarmingly high level. Objective indicia reveal that the

public strongly believes that excessive spending fosters corruption of the electoral process. The depth of this concern is confirmed by repeated attempts by state legislatures to reform systems of campaign finance.

A holding that campaign expenditure limits are not *per se* unconstitutional would have healthy consequences for the Nation's political system as a whole. It would permit States to experiment with novel methods of campaign finance reform and to determine which of those methods work best in the real world. This point is illustrated by the unique experience of Albuquerque, New Mexico, which maintained a system of campaign expenditure limits for almost three decades after *Buckley*. That regime attracted extraordinarily broad levels of public support, fostered electoral competition, reduced the inertia of job security for incumbents, and increased public participation in elections for city office. Albuquerque's history strongly suggests the wisdom of relying on the legislative process to develop creative solutions to the pressing social problem of public dissatisfaction with the campaign finance system.

ARGUMENT

A. States Have A Compelling Interest In Using Carefully Crafted Expenditure Limits To Combat A Pervasive Public Perception Of Corruption And Distortion In The Electoral Process

1. This Court has held repeatedly that combating the *appearance* of corruption is a compelling government interest that may properly be redressed with appropriately tailored campaign finance reform. See, *e.g.*, *Buckley*, 424 U.S. at 25; *McConnell* v. *FEC*, 540 U.S. 93, 142 (2003); *FEC* v. *Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 496-497 (1985). There is nothing "novel [ ]or implausible" in that proposition (*McConnell*, 540 U.S. at 144); the perception that moneyed interests have excessive influence in the political process breeds cynicism about the machinery of democ-

racy and "could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't Political Action Comm'n*, 528 U.S. 377, 390 (2000).

Of particular importance here, this problem is not limited to campaign *contributions*, which pose the most obviously plausible risk of corrupting the political process. Governments at all levels have a vital interest in fashioning an electoral system that assures their citizens that the fruits of the process will be an honest, objective, responsive public administration. As the amounts *spent* on American elections have soared, however, there has been a proportional escalation in public cynicism about the quality of government these expenditures have purchased. Here, *amici* focus on this important aspect of the problem: unlimited campaign *expenditures* have a corrosive effect both on voters' confidence in the integrity of government and on public willingness to participate in the political process.

That danger was a central rationale for enacting Vermont's limitation on campaign expenditures. The state legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased," and that "[c]itizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns." 1997 Vt. Laws P.A. 64 (H.28), ¶¶ 4, 10. Those findings were amply supported by polling of the Vermont electorate and the testimony of the State's elected officials. See *Landell*, 382 F.3d at 116-117. And it was confirmed by the district court in this case, which found as a fact that the State's expenditure limits would serve to preserve faith in democracy. *Landell* v. *Sorrell*, 118 F. Supp.2d 459, 482-483 (D. Vt. 2000), affirmed in part and vacated in part by 300 F.3d 129; see *Landell*, 382 F.3d at 103.

2. The concern that motivated the Vermont legislature is ubiquitous across the Nation: Empirical data reveal the existence of a pervasive public perception of corruption in elec-

tions that is inextricably intertwined with dismay about excessive campaign spending. It is imperative that state governments have the tools to combat this perception, which is undermining public faith in the integrity of government.

The logical connections that have led much of the public to become disillusioned by unlimited spending on political campaigns are not hard to discern. To begin with, the issue is not just one of "corruption" in the classic sense of bribery or something akin to it. See Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L. J. 1, 5-7 (1997) (discussing varying theories of corruption and their respective scopes). Rather, a significant public concern is that excessive and often grossly imbalanced spending muffles the voices of some candidates and distorts the way vital public issues are ventilated during a campaign. This concern is validated by the reality that approximately 90 per cent of the time, the candidate who spends the most money wins the election. U.S. PIRG Education Fund, THE WEALTH PRIMARY: THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL PRIMARIES at 4 (2002), *available at* www.uspirg.org/ reports/WealthPrimary10_02.pdf.

But that is only one aspect of a larger problem: voters believe that if expenditures are not capped, candidates will be forced to go all out to raise money. That imperative, in the public's view, has myriad unfortunate effects. It fosters classic "money under the table" corruption because it puts a premium on getting campaign cash. It forces elected officials to shirk official duties in favor of raising money and mollifying contributors. With so much money flowing into the system, ordinary voters get the (reasonable) impression that the recipients of that money will be responsive to contributors rather than to the broader electorate. And the ability to spend unlimited amounts gives incumbents a virtually insuperable advantage when they seek re-election; incumbents typically raise more money than their challengers – and almost inevitably win – because contributors may believe (correctly or

not) that they will receive official favors in return for contributions.

Contribution limits, especially in the era of "bundling," are not a complete answer to any of these problems. And the more that is spent on campaigns – with endless television commercials, direct mail, and computerized telephone calls all visible to or heard by the electorate – the more a typical voter will see the visible fruits of campaign spending. Inevitably, this barrage will lead reasonable voters to conclude that raising and spending money is all candidates care about.

Thus, even with contribution limits in place, the evils of an accelerating race for campaign cash sap public confidence in the electoral system:

> The predictable effect [of a bar on expenditure limits] has been to increase the pressures to satisfy the ever-increasing, but uncontrollable, demand for campaign cash. * * * Instead of freeing the political process from the effects of wealth disparity and the reality and appearance of corruption, the mutation produced by *Buckley* places unending pressure on public officials to raise money from special interests in a highly public manner calculated to create precisely the appearance and reality of quid pro quo corruption that the *Buckley* Court recognized as a threat to the democratic process.

Neuborne, *supra*, 37 WASHBURN L.J. at 33-34, 37.

3. This concern is not just theoretical: it is borne out by hard data. Nationally, over two-thirds of registered voters believe that candidates spend too much money on election campaigns. Lake Research Partners, *Survey Results from a Nationwide Survey of 1000 Registered Voters* (hereinafter "*National Survey*"), at 7 (2006), *available at* http://demos.org/campaignfinancesurvey. A nearly identical number correlated election spending with the integrity – or lack of integrity – of the electoral process. *Id.* at 13.

Targeted state polls reveal more detailed insights into voters' perceptions regarding the relationship between corruption and campaign spending. Strikingly, 68 percent of Pennsylvania voters believe that the current level of campaign spending is a "serious threat [to] the basic fairness and integrity of our political system." Lake Sosin Snell Perry & Assoc., Inc., *Banners From a Survey of 500 Registered Voters in the State of Pennsylvania* (hereinafter "*PA Survey*") at 3 (1998), *available at* http://www.courts.state.pa.us/Index/Supreme/appenda.pdf. In fact, "[c]orruption is the word that voters themselves use most frequently in describing what is wrong with campaigns and elections today." *PA Survey*, at 16. Voters in Maryland also equated campaign spending with the term "corruption." The Center for American Politics and Citizenship, University of Maryland, and The Schaefer Center for Public Policy, University of Baltimore, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, at 2 (2002), *available at* www.capc.umd.edu/rpts/MDCampFinSrvy.pdf. The public perception of the situation has deteriorated over time, resulting in a current assessment of democracy as being, in effect, broken. *PA Survey*, at 16; see also *id.* at 11.

Pennsylvania and Maryland have company in this perception. In the words of one commentator, Wisconsin poll results in 2005 "revealed a stunning cynicism, confirming other surveys that consistently place politicos and journalists near the used car salesmen in public confidence." Thomas C. Reeves, *Selfish Politicians* (2005), at 1, *available at* http://hnn.us/blogs/entries/18029.html. The commentator was reacting to figures confirming that "only 6% of the residents in Wisconsin believe their elected official represent the interests of the constituents on important issues." Wisconsin Policy Research Institute, Inc., *Wisconsin Citizen Survey*, October 2005 (hereinafter "*Wisconsin Survey*"), at 12, *available at* http://www.wpri.org/Reports/Volume18/Vol18o6.pdf. Wisconsin voters split nearly evenly between believing that local

officials represent their own interests and believing that they represent special interests. *Ibid.*

The widespread perception that excessive campaign spending is distorting the political process also is reflected in survey data showing that the voting public believes campaign spending limits would curtail corruption of the process. The vast majority – 87 per cent – of registered voters across the country favor the implementation of spending limits. *National Survey* at 8. More than three-quarters of those polled see spending limits as a deterrent to corruption in campaigns. *Id.* at 12. Targeted polls in selected states yield similar results:

- "In November 2000, voters in 56 of Wisconsin's 72 counties were asked whether they supported campaign finance reform that would limit contributions and expenditures and require complete and timely disclosure. Over 90% of the voters answered 'yes' in this referendum * * * ." Wisconsin Briefs from the Legislative Reference Bureau, Brief 01-9, at 1 (March 2001), *available at* http://www.legis.state.wi.us/lrb/pubs/wb/01wb9.

- When polled on spending in judicial elections, 59 per cent of a split sample believed that candidates in Pennsylvania spend too much money, not having been told how much candidates spend. That number jumped to 81 per cent for the portion of the split sample that was given an example of how much a candidate spent last year. *PA Survey* at 4.

- Similarly, "56 per cent of Ohioans favor spending limits for judicial elections." Frontline, *Justice for Sale, Summaries of Selected Studies*, at 6, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html.

- When West Virginia voters were polled regarding whether they believed "there should be a limit on

> how much a person can spend on running for public office," more than 75 per cent said yes, while only16.8 per cent said no. Ken Hechier, *Financing Elections: West Virgina, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990).

4. Public concern about electoral excesses – and, in particular, with unlimited campaign expenditures – also is reflected in repeated legislative efforts to reform the campaign finance process, at both the state and the federal level. That legislatures have turned to this subject time and again powerfully illustrates continuing dissatisfaction among the electorate.

Before *Buckley*, states experimented widely with expenditure limits. In reaction to public discontent with the spoils system at the turn of the twentieth century, many states enacted spending caps. "[B]y 1932 over half of the states had such provisions. By 1964, thirty states had provisions that attempted, in one way or another, to limit total campaign expenditures." Gross & Goidel, THE STATES OF CAMPAIGN FINANCE REFORM (2003), at 4.

Congress, too, experimented with campaign spending limits for House of Representatives and Senate races. See Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907), as amended by Pub. L. No. 62-3, 37 Stat. 25 (1911) (effecting expenditure limits of $5,000 and $10,000 for U.S. House and Senate campaigns, respectively); Corrupt Practices Act, Pub. L. No. 68-56, 43 Stat. 1070 (1925) (raising those limits to between $2,500 and $5,000 for U.S. House campaigns and between $10,000 and $25,000 for U.S. Senate campaigns).

The Court's decision in *Buckley*, of course, has been widely thought to bar expenditure limits. The consequences of that result have been as damaging as they were predictable. In the post-*Buckley* period, voter participation in both national and gubernatorial elections has generally declined.

Gross & Goidel, *supra*, at 88. Indeed, in 1996, voter cynicism led to the lowest voter turnout in a presidential race in five decades. Donald J. Simon, *Beyond Post-Watergate Reform: Putting and End to the Soft Money System*, 24 J. LEGIS. 167, 174 (1998).

In light of this decline in voter participation, it is not surprising that the appetite for reform at the state and local level remains strong. State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived approach to expenditure limits. For example:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98. Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, available at* http://www.campaignfinancesite.org/structure/states1.html.

- From 1972-1996, 45 campaign finance initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment. *Ibid.*

- As of 1998, 24 states had statutes providing some sort of public financing for election campaigns. *Ibid.*

- At least 15 states and major cities such as New York, Seattle, Portland and San Jose have some sort of voluntary expenditure limitation. See Federal Election Commission, *Campaign Finance Law 2000: CHART 3-A: EXPENDITURE LIMITATIONS, available at* www.fec.gov/pubrec/cfl/cfl00/cfl00chart3a.html; Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, supra;* Seattle, City Council Ordinance 107772 (Nov. 30 1978); Press Release, Public Campaign, *"Voter Owned Elections" Be-*

comes Law in Portland, Oregon, (May 19, 2005), *available at* www.publicampaign.org/pressroom/pressreleases/release2005/release_05 _19_05.htm; National Civic League, *Spending Limits Working in San Jose, California*, 3 NEW POLITICS, at 3 (Spring 2002).

- Other states and localities have seen their reform efforts run afoul of what courts perceived to be *Buckley*'s absolute bar on expenditure limits. Albuquerque's comprehensive system of expenditure limits, which is discussed in more detail below, was invalidated by the Tenth Circuit in *Homans* v. *City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). Ohio attempted to enact spending limits at both state and local levels, but the Sixth Circuit invalidated spending limits in city council races (*Kruse* v. *City of Cincinnati*, 142 F.3d 907 (6th Cir.), cert. denied, 525 U.S. 1001 (1998)), and held that *Buckley* bars spending limits in state judicial campaigns. *Suster* v. *Marshall*, 149 F.3d 523 (6th Cir. 1998). And the federal courts struck down Proposition 73, approved by the California electorate, which prescribed (among other reforms) mandatory limitations on certain types of political expenditures.[2] See *Serv.*

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[2] Majorities of voters supported both Proposition 73 and Proposition 68, which contained voluntary campaign spending limits accompanied by public financing of campaigns. See Robert Dreyfuss, *Reform Beyond the Beltway, States as Laboratories of Clean Money*, 38 THE AMERICAN PROSPECT 50, 53-54 (May/June 1998). Voters preferred the system of mandatory spending limits by an appreciable margin. Before it was invalidated, California courts held that Proposition 73 should take precedence over Proposition 68 because it received more votes. *Taxpayers to Limit Campaign Spending* v. *Fair Political Practices Comm'n*, 51 Cal. 3d 744 (1990).

Employees Int'l Union v. *Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989); *Service Employees International Union* v. *Fair Political Practices Comm'n*, 747 F. Supp. 580 (E.D. Cal. 1990), aff'd, 955 F.2d 1312 (9th Cir. 1992).[3]

Campaign finance reform was achieved most recently in Connecticut – in an effort that clearly illustrates the connection between public cynicism about the electoral process and the perceived need to limit campaign expenditures. In reaction to a corruption scandal that sent Governor John G. Rowland to prison, Governor M. Jodi Rell announced the introduction of sweeping campaign finance reform legislation. In her January 2005 announcement, Governor Rell noted the voters' perception of an association between electoral corruption and unconstrained campaign spending. She observed that one of the three complaints she hears most often from her constituents is that candidates spend too much money on election campaigns. Press Release, The Office of Governor M. Jodi Rell, *Gov. Rell Introduces Sweeping Reform Proposals for Campaign Finance* (January 10, 2005), at 3, *available*

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[3] Ten years later, the citizens of Massachusetts passed a referendum that provided for voluntary spending limits, accompanied by public financing. The state legislature, however, was unwilling to fund the public financing aspect of the referendum. Applying the state constitution, the Massachusetts Supreme Judicial Court held that the law must be funded or repealed. *Bates* v. *Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). The state legislature consequently repealed the law. Michael Saxl & Meaghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and Maine's Solution* (2004), at 476-477, *available at* http://www.law.harvard.edu/students/orgs/jol/vol41_2/saxl.pdf. Another campaign finance reform bill, this one containing mandatory expenditure limits, is now pending in Massachusetts. The bill contains no provision for public financing. Mass. HB No. 118 (2005), *available at* http://www.mass.gov/legis/bills/house/ht00/ ht00118.htm.

at http://www.ct.gov/governorrell/cwp/view.asp?Q=288454 &A=1761; see also WHDH 7 News Boston, *Connecticut Lawmakers Pass Sweeping Campaign Finance Bill* (Dec. 21, 2005), *available at* http://www2.whdh.com/news/articles/national/BOS10050/. The reform bill, signed into law by Governor Rell in December 2005, provides for voluntary expenditure limits combined with public campaign financing. 2005 Ct. P. A. 5 (enacting 2005 Ct. S.B. 2103).

Connecticut's experience also illustrates the constraints that states feel in this arena, and their concern that *Buckley*'s perceived bar on expenditure limits handicaps effective reform. During the House debate on Senate Bill 2103, an amendment was proposed that would have eliminated the public financing provision in the reform. In response to the amendment's introduction, Representative Spallone, one of the bill's sponsors, emphasized that state reform efforts may be hamstrung unless expenditure limits are permissible:

> In a perfect world, I think that elections based only on individual contributions without public financing may work. However, we operate in the context of a Supreme Court decision from 30 years ago, which effectively said we can limit the amount that each of us can donate to a campaign, but not the amount that we can each spend on our campaign. And that's [*sic*] created the arms race, as it were, in financing for campaigns at the State, national, and local levels.

Transcript of the House Debate of 2005 Ct. S.B. 2103 at 60 (Nov. 30, 2005).

To be sure, popular clamor for a particular outcome generally is not, of itself, a sufficient basis to overcome constitutional limits on legislative discretion. See *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). But the public perception that candidates' excessive focus on campaign dollars has corrupted the electoral process and effectively disenfranchised ordinary voters – which is starkly revealed by the

public opinion data and the history of legislative efforts in this area – is itself a problem of constitutional dimension. Our democratic system rests on the principle that eligible voters will participate in the electoral process and will feel justifiably confident that the process and its results are fair, informed, and responsive. And it is difficult to imagine a constitutional interest more compelling than that of preserving the citizenry's faith in democracy.

Moreover, this is not a problem of sacrificing free speech in order to assure electoral integrity. That is a false choice. It is possible to craft spending limits that allow ample room for candidates and their supporters to convey their message thoroughly and forcefully. Indeed, while unlimited campaign spending may increase the volume of speech in one sense, it also may inhibit robust debate of issues, decrease public involvement and confidence in the electoral process, and foster a fundamental disaffection with democratic governance on the part of the electorate.

B. A Rule That Allows States To Experiment With Campaign Expenditure Limits Permit The Development Of Electoral Systems That Combat Public Cynicism While Preserving First Amendment Values

A holding by this Court that campaign expenditure limits may be permissible would not mean that such limits always (or, for that matter, often) would be upheld. Restrictions on campaign spending would be subject to the most exacting constitutional scrutiny. As the Second Circuit recognized in remanding this case for further fact-finding regarding Vermont's expenditure caps (see *Landell*, 382 F.3d at 135-137), proponents of such limits would be obligated to show that the state regulation truly serves a compelling interest, is narrowly tailored, and was formulated to serve its goal effectively.

Unfortunately, the Court's decision in *Buckley* has been widely understood – erroneously, in our view – to stand for

the proposition that no level of corruption (perceived or real) and no level of distortion in the electoral system could be compelling enough to justify campaign spending limits, and that such limits never could be tailored narrowly enough to survive constitutional scrutiny. See *Landell*, 382 F.3d at 107 (citing cases); *id.* at 151-152, 155-156, 159, 172, 185 (Winters, J., dissenting). As a consequence, many courts and state legislatures have taken *Buckley* to deny states the ability to experiment with novel methods of campaign finance reform or to test the practical consequences of spending caps.

That outcome has been "fraught with serious consequences to the Nation" (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), as states have been unable to make use of what may be the most efficacious tool with which to address the growing public cynicism about the electoral process. By contrast, freeing states to implement expenditure caps if they are able to make the requisite showing would have enormously healthy consequences for the Nation's political system. A constitutional rule that allows states at least to attempt to make the strict showing necessary to justify spending limits could lead to the development of systems that restore public faith in democracy, while also fostering robust debate, candidate interaction with the electorate, a full exploration of pressing issues, and fair campaigns.

This point is illustrated by considering the unique experience of one "courageous" jurisdiction that has been able, in the post-*Buckley* era, to "serve as a laboratory" regarding the real-world effects of campaign expenditure limits. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). Beginning in 1974, the city of Albuquerque, New Mexico, made use of mandatory spending limits in local elections. Until those limits were held unconstitutional by the Tenth Circuit three decades later in *Homans*, this regime served the goals of increasing electoral competition – with *greater* access to office by new candidates and *no* sacrifice in voter participation in

elections for city office. See State PIRGs' Democracy Program, *The Case for Limits on Campaign Expenditures*, at 1, *available at* http://www.buckbuckley.com/pdfs/spending_limits_policy_background.pdf. It also served to decrease the advantage that incumbents typically hold in electoral competition. For example, none of the four mayoral candidates who sought reelection during the period between 1974 and invalidation of the spending limits regained their office. Testimony of Donald A. Gross at Tr. 88:6-89:9, *Landell* v. *Sorrell*, 2:99-cv-00146-WKS (D. Vt. June 2, 2000); Anthony Gierzynski, *Albuquerque Election Financing* (2002), at 5-6, *available at* www.nvri.org/library/cases/albuquerque/electionfinancinganalysis.pdf. Albuquerque's figures contrast sharply with other U.S. mayoral races, in which incumbents are reelected approximately 80 per cent of the time. *Ibid.*

The City's pre-*Homans* experience with campaign spending limits also contrasts sharply with developments in 2005, during Albuquerque's first full election cycle without spending limits. That year, the incumbent mayor raised a war chest of nearly $1.2 million, a record-setting amount for Albuquerque. He was reelected after drastically outspending his opponents. Jim Ludwick, *Chávez Raised, Spent Nearly $1.2 Million*, ALBUQUERQUE JOURNAL, 2005 WLNR 16559603 (Oct. 12, 2005).

Albuquerque's limits held more than 90 per cent public approval when they were first enacted. They remained highly popular, garnering 87 per cent support over twenty years later, near the time the Tenth Circuit felt obliged by *Buckley* to dismantle them. See *The Case for Limits on Campaign Expenditures*, *supra*, at 1. In 1998, after living with expenditure limits for more than two decades, Albuquerque's voters expressed their clear view that the City's campaign finance system was working:

- "Support for spending limits in Albuquerque's local elections is overwhelming and intense. More than eight in ten voters favor a law that limits

spending in local election campaigns, including a solid majority which strongly favors the law. Intense support for spending limits crosses gender, age, education, economic and partisan lines."

- "Voters believe that spending limits have made Albuquerque elections more fair and honest than [those in] other big cities. A solid majority agree on this point and the perception crosses party identification * * * ."
- "When voters are presented with two opposing viewpoints, an overwhelming majority believe that stricter and lower limits on campaign spending improves the fairness of elections in Albuquerque. Similarly, after hearing arguments from both sides, two thirds of voters believe that putting stricter limits on campaign spending improves the honesty and integrity of local elections."

Lake Snell Perry & Assoc., *Public Perceptions of Campaign Spending Limits: Finding from a Survey of 400 Registered Voters in the City of Albuquerque, New Mexico*, at 3 *available at* http://www.nvri.org/library/cases/albuquerque/public perceptions_Albuquerque_NM.pdf.

Other analyses of Albuquerque's campaign finance regulations revealed that voter turnout was at least as high as in other cities of similar size, that incumbents had less of a campaign spending advantage, and that officeholders therefore were more vulnerable when compared to incumbents in similar cities. See *Homans* v. *Albuquerque*, 217 F. Supp. 2d 1197, 1200-1201 (D.N.M. 2002). This led one commentator to find that "democracy in Albuquerque is actually as healthy, if not healthier than in other cities," concluding that Albuquerque's campaign spending limits contributed substantially to this outcome. Gierzynski, *Albuquerque Election Financing*, *supra*, at 4.

Of equal importance, Albuquerque's experience belies the argument that mandatory spending limits serve principally to protect incumbents. Opponents of restrictions on campaign expenditures often advance this "incumbency advantage" argument as a primary rationale. See, *e.g.*, Br. of Vermont Republican State Committee at 42-43; Br. of Mitch McConnell as *Amicus Curiae* at 18-22; *Landell*, 382 F.3d at 151, 183, 196, 199 (Winters, J., dissenting). The fact that the argument falls away in the actual practice of spending limits demonstrates the value of state political experimentation over academic hypothesis in this arena.

Albuquerque's experience holds several lessons for this case. It makes clear that campaign expenditure limits may be tailored to effectively address public cynicism regarding the role of money in political campaigns, while also preserving First Amendment values. And more broadly, it reaffirms the importance – often acknowledged by this Court – of relying on the legislative process to produce creative solutions to pressing social problems.

Accordingly, *amici* urge the Court to make clear that limits on campaign expenditures should be subject to close review – but *not* to scrutiny that is "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). The Court should clarify that caps on spending may be permissible if set at a level that reasonably assures an adequate opportunity to get the candidate's message across to the electorate in an intelligible and comprehensive way. Thus, the constitutional touchstone is a practical one: whether a spending limit is too low to permit the candidate to achieve reasonably broad and consistent access to the electorate. That is a matter on which state legislatures should have discretion, taking into account the nature of the race, the size of the electorate, the availability of media outlets, the costs of various types of communications, and other relevant factors – all subject to judicial review. Such a holding would free state and local governments from artifi-

cial and absolute constraints on their ability to experiment in the realm of campaign finance reform, and thus would equip elected officials with the full complement of tools they need to restore public faith in the democratic process.

CONCLUSION

The Court should affirm the court of appeals' judgment that limits on campaign expenditures may be constitutional, if narrowly tailored and effectively designed.

Respectfully submitted.

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Nos. 04-1528, 04-1530, and 04-1697

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners/Cross-Respondents,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents/Cross-Petitioners,

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, AARP, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND THE UNION FOR REFORM JUDAISM IN SUPPORT OF THE RESPONDENTS-CROSS-PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

The *amici curiae* are organizations that advocate for campaign finance reform, including limits on campaign spending, in order to foster greater public participation in matters of government, increase electoral competition, and reduce the appearance of impropriety in the electoral

process.[1] The current perception in state and local government that all spending limits are per se unconstitutional presents a significant barrier to their work in engaging the public in the reform process.

TheRestofUs.org is a nonprofit, nonpartisan organization whose mission is to reduce the influence of money on the political process. TheRestofUs.org works to inform and educate mainstream Americans, including the citizens of Vermont, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of Vermont PIRG, other state PIRGs have an interest in enacting spending limits in their states.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including Vermont, Common Cause's mission is to ensure open, accountable, and effective government at the federal, state, and local level. Common Cause advocated for the spending limit provisions of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, and participated in the defense of FECA before the Supreme Court.

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, including Vermont, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. The League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

AARP is a nonpartisan, nonprofit membership organization with more than thirty-six million members age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP neither supports nor opposes candidates for public office. Nor does it contribute money to candidates for public office or to political parties. AARP educates the public about issues of concern to older Americans and their families through voter guides, issue workshops, candidate forums, and advocacy issue ads. AARP has long advocated that political campaigns focus on discussion of matters important to all Americans. AARP Vermont was active in supporting enactment of Vermont Act 64, the statute in question in this case. The legality of state limits on campaign expenditures affects AARP's interest — and that of AARP members across the nation — in protecting the integrity of our election processes.

Public Campaign is a nonprofit, nonpartisan organization dedicated to campaign reform that aims to reduce the role of

big special-interest money in American politics. Public Campaign works with a range of organizations, including some in Vermont, whose members are not fairly represented under the current campaign finance system in many states.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan organization that, through litigation, focuses Americans, including the citizens of Vermont, on unethical conduct on the part of government officials. CREW's aim is to encourage government officials to act in the public interest.

The Union for Reform Judaism, founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. *Deuteronomy* 16 teaches: "You shall not judge unfairly: you shall know no partiality; you shall not take gifts, for gifts blind the eyes of the discerning and upset the pleas of the just." The *Talmud Tractate Kethuboth* notes, "What is the reason [for the prohibition against taking] a gift? Because as soon as a man receives a gift from another he becomes so well disposed towards him that he becomes like his own person, and no man sees himself in the wrong." For Reform Jews, these ancient lessons resonate today in witnessing repeated examples of the intentional or unintentional corrupting influence of money on our public policy process.

SUMMARY OF ARGUMENT

Under the Constitution's Guarantee Clause, states are obligated to maintain a republican form of government — a government of the people. In an effort to meet this obligation, the Vermont legislature enacted Act 64 in 1997, that, among other things, limited the amount of money state candidates can spend on their campaigns. *See* Vt. Stat. Ann. tit. 17, §§ 2801 *et seq*. After a series of appeals ending in the

Second Circuit's denial of a rehearing en banc, the Second Circuit recognized that *Buckley* v. *Valeo*, 424 U.S. 1 (1976), did not impose a sweeping "fatal in fact"[2] strict scrutiny to all forms of expenditure limits.

Buckley's review of expenditure limits recognized that those limits could be justified by interests beyond the effort to eliminate corruption in elections. One interest that weighs strongly in favor of reform is the state's interest in preserving its republican form of government. The underlying principle of a republican government is that citizens have the right and responsibility to elect representatives to govern them. The representatives, in turn, must act in the interest of those they represent. This relationship thrives when representatives deliberate upon and determine the collective best interest. The republican form of government also depends on public participation in elections and in communicating with their representatives, which enhances the legitimacy of government and improves public policy by fostering the involvement of citizens with a wide range of perspectives.

In enacting expenditure limits, Vermont understood the importance of deliberation and public participation in preserving a republican form of government. These important traditions have long been part of Vermont's political culture. Act 64's expenditure limits promote deliberation and public participation by preventing corruption and its appearance; increasing the competitiveness of elections and the number of candidates who can run for elected office; creating more time for deliberation among elected officials; and fostering contact between voters and candidates.

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[2] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

Amici respectfully request that the Court defer to Vermont's efforts to maintain a republican form of government through promoting deliberation and participation, and affirm the Second Circuit's decision with respect to Vermont's campaign expenditure limits.

ARGUMENT

I. *BUCKLEY* DOES NOT PRECLUDE STATE REGULATION OF CAMPAIGN EXPENDITURES.

This Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1, expressly left open the possibility that campaign expenditure limits, when sufficiently tailored, *can* pass constitutional muster. The Second Circuit recognized this and held below that state interests other than the avoidance of corruption balance against, and may indeed outweigh, competing interests. *See* Pet. App. 136a-146a. One interest strongly supporting spending limits — an interest unquestionably contemplated by the Constitution — is the protection of a state's republican form of government. That interest weighs dispositively in favor of sustaining the limits at issue in this case and affirming the holding of the Second Circuit.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA") reforms Congress passed to prevent corruption and the appearance of corruption. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On that record, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify . . . [the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). But in so holding, the Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh free speech concerns. *See* Pet. App. 113a-118a.

Buckley related solely to a federal regulation of federal candidates. The Court has never considered the constitutionality of a *state's* regulation of expenditures of candidates for *state* office for the purpose of protecting the republican form of *state* government. The Court's analysis of Vermont's expenditure limits should take into account that these limits represent a *state's* conscious and considered effort to bolster deliberation and political participation in order to prevent the erosion of its republican government. This distinction from *Buckley* changes the constitutional calculus in at least two ways. *First*, the Constitution's affirmative protection of states' republican forms of government counsels deference when the states enact protective measures of their own. *Second*, states have a significant interest in preserving their republican forms of government through enhanced deliberation and political participation.

II. VERMONT HAS A VITAL INTEREST IN PRESERVING ITS REPUBLICAN FORM OF GOVERNMENT THROUGH AN ELECTION PROCESS THAT ENCOURAGES PUBLIC INVOLVEMENT AND DELIBERATION.

Vermont has an undeniable right to preserve the integrity of its own government and electoral system. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788-789 (1978) ("[P]reserving the integrity of the electoral process . . . [is an] interest[] of the highest importance."); *accord McConnell* v. *FEC*, 540 U.S. 93, 136-137 (2003) (considering competing interests such as the integrity of the electoral process). Vermont designed its expenditure limits to (1) "bolster voter interest and engagement in elective politics" and (2) "enhance the quality of political debate and voters' understanding of the issues." Pet. App. 127a. These interests are themselves safeguarded by the Constitution

because they protect and strengthen the infrastructure of Vermont's representative government. Under the Guarantee Clause,[3] Vermont's efforts to achieve those ends, among others, are entitled to deference even in the face of competing First Amendment interests.[4]

A. The Court Should Defer to a State's Effort to Preserve the Republican Form of its Government.

The Court should weigh the state interests affected by expenditure limits in the context of the particular system of

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[3] "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4.

[4] First Amendment interests have been advanced both against and in favor of campaign finance reforms. *See Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400-401 (2000) (Breyer, J., concurring) ("constitutionally protected interests lie on both sides of the legal equation"). The Guarantee Clause is closely aligned with and predated the First Amendment protections weighing in favor of reform:

> Because it was adopted prior to the drafting and ratification of the First Amendment, and long before the First Amendment was applied to the states, the assurance of republican governments also can be seen as independently protecting public deliberations in the law-making process.

Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. Colo. L. Rev. 849, 865-869 (1994); *see also* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767, 828 (2003) (protecting the republican form of government under the Guarantee Clause is a compelling government interest for enacting campaign finance reform). And some, such as former Chief Justice Rehnquist, have suggested that the Fourteenth Amendment incorporates only the "general principle" of the First Amendment (presumably on both sides of the campaign finance reform issue), which could further elevate the relative weight of the Guarantee Clause in this instance. *See Buckley*, 424 U.S. at 291 (Rehnquist, J., concurring and dissenting).

government that the spending limits were enacted to protect. *See generally* Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 Hastings L.J. 77 (2004). Here, the logical starting point is the republican form of government, from which flows its corresponding values of deliberation and public participation.

Vermont enacted expenditure limits to protect the integrity of the republican form of government it is, under the Guarantee Clause, constitutionally obliged to maintain. *See* U.S. Const. art. IV, § 4; *Minor* v. *Happersett*, 88 U.S. (21 Wall) 162, 175 (1874). Not only does the Guarantee Clause require states to maintain a republic, but it expressly compels the United States, which includes the federal judiciary, to help states achieve that goal. For this reason, the interest in preserving republican government weighs heavily in favor of supporting the constitutionality of a state statute and courts should defer to a state's determination that a challenged statute protects that interest. This deference is consistent with the Supreme Court's repeated affirmation, under the Guarantee Clause, of the states' right and responsibility to control their governments. *See Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (each state has a "constitutional responsibility for the establishment and operation of its own government") (citing U.S. Const. art. IV, § 4); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991).

Although all states have an obligation to maintain a republican form of government, they may choose to approach that goal differently. The states' varied sizes, demographic compositions, and political cultures require tailored strategies that respond to their individual circumstances. Familiar examples abound. Most states have bicameral legislatures, but one (Nebraska) has a unicameral legislature. State legislatures vary widely in number of representatives, the length of their terms, and whether term limits are imposed.

Terms of governors are for different numbers of years. States may or may not have certain positions such as lieutenant governors or treasurers, and some positions, such as the state official responsible for education, may or may not be an elected position.

State election practices also differ widely because states face different issues and challenges in achieving the goal of strong voter participation. Some states allow voter registration on-the-spot on election day; others set earlier registration deadlines. Some states allow mail-in voting and early voting opportunities before the traditional election day; others do not. States are in a good position to decide, based on such factors as their traditions, and the location and number of voters, how to achieve the goal of meaningful voter participation. Because of their intimate familiarity with their unique government systems and political cultures, states and their citizens have special insight on how to ensure that their systems remain republican in form and practice. And to protect and maintain truly representative democracies, states must be allowed to serve as testing grounds. *See New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is especially true where liberty interests and the goal of representative government are at stake. Reasonable campaign finance strategies that fit the circumstances, goals, and needs of that state are entitled to deference by the courts, including this Court.

This deference is especially warranted where, as here, campaign finance laws were not enacted to handicap challengers. In adopting the expenditure limits at issue, the Vermont legislature responded to a groundswell of strong public policy arguments made by citizen groups. Vermont's response included higher spending limits for challengers than for incumbents, refuting the notion that the limits were designed to entrench current officeholders. Moreover, there

is evidence that mandatory spending limits do not insulate incumbents from successful challenge. *See* Tr. X-88 (Donald Gross) (stating that no mayoral incumbent won re-election while Albuquerque campaign spending law was in effect).[5]

B. A Republican Form of Government Depends Upon Deliberation and Political Participation.

Vermont's reasoning in favor of expenditure limits is not a pretext to insulate incumbents, but represents a genuine effort to preserve that state's republican form of government. "[T]he distinguishing feature of [the republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891); *see also The Federalist No. 14*, at 100 (James Madison) (Clinton Rossiter ed., 1961) ("[I]n a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives."). The power in the republic rests in its citizens, who bear ultimate responsibility for how the government is administered, while elected officials, for their part, are responsible for acting in the interest of those they represent. *See Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Representative government is rooted in this mutually dependent relationship between elected officials and their constituents. That relationship in turn depends on public participation and deliberation (both by representatives and citizens). Elected officials have a responsibility to determine through vigorous debate and analysis the best interests of

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[5] "Tr." refers to the trial court transcript, which was filed in full as part of the record before the Second Circuit; "Ex." refers to trial exhibit volumes also filed as part of the record below.

their communities. Officials should aspire not simply to aggregate preferences from various interests, but to deliberate public issues actively and determine the best course. The Founding Fathers contemplated this deliberative ideal: "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs." *The Federalist No. 71*, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Representatives are charged with making decisions based on what they believe is right. In the campaign finance context, this Court has held that officeholders must be free from "undue influence" on their judgment, *see FEC* v. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. 432, 441 (2001), so that they can deliberate and decide issues "on the merits." *See McConnell*, 540 U.S. at 153. It is legitimate for a state to conclude that expenditure limits facilitate legislating "on the merits" by improving policy debate.

In enacting expenditure limits, Vermont reached the reasoned conclusion, among others, that improved deliberation and participation must extend to the citizens who inform the debate about the community's best interest. Vermont believes, and rightly so, that political participation and deliberation is crucial to a republican form of government.[6] Indeed, without public participation, a state government is republican in name only. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) ("the constitutional order must be

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[6] Alexis de Tocqueville observed that "[w]hat is understood by a republican government in the United States is the slow and quiet action of society upon itself. It is a regular state of things really founded upon the enlightened will of the people. It is a conciliatory government, under which resolutions are allowed time to ripen, and in which they are deliberately discussed, and are executed only when mature." Alexis de Tocqueville, *1 Democracy in America* 435-436 (Phillips Bradley ed., Vintage Books 1945).

preserved by a strong, participatory democratic process"). In a republic, citizens are "participator[s] in the government of affairs," Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in *1 The Founders' Constitution* 142 (Philip B. Kurland & Ralph Lerner eds., 1987), and the burden rests squarely on them to debate those affairs and analyze "the relative merits of conflicting arguments." *See Bellotti*, 435 U.S. at 791; *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.").

Public participation is integral to republican government for at least two reasons. *First*, it improves policy outcomes by making decision-makers aware of diverse perspectives. Vermont understood that in order for a legislature, or any other decision-making body, to settle on the best policy, it must have before it a diversity of perspectives. A broader range of perspectives provides legislators with more alternatives from which to choose, and the broader range of views increases the likelihood that the strengths and weaknesses of competing alternatives will be exposed. In addition, a breadth of perspectives tends to remedy any undue influence on policy decisions produced by the most forceful participants, who threaten to drown out those with meritorious, but different, ideas.

Second, public participation enhances the legitimacy of representative government. People are more likely to submit to government directives — to obey laws and regulations, pay taxes, join the National Guard — if they have participated in deciding how to spend those taxes, commit that National Guard, and craft those laws. *See* Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* 10 (2004) ("The hard choices that public officials have to make should be more acceptable, even to those who receive less than they deserve, if everyone's

claims have been considered on the merits, rather than on the basis of the party's bargaining power.").

Participation that improves decision-making and enhances government legitimacy takes many forms: voting, public debate through letters or web logs, campaign contributions, water cooler discussions, association membership, and candidacy for elected office. But in recent years, scholars have warned of declining political participation and how it has shifted power to a select few and undermined the quality of debate. *See* Robert Putnam, *Bowling Alone* 31-47, 336-349 (2000); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life, in Civic Engagement in American Democracy* 498-506 (Theda Skocpol & Morris P. Fiorina eds., 1999). Realizing that the absence of participation was a threat to its republican form of government — Justice Brandeis warned that "the greatest menace to freedom is an inert people," *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) — Vermont fairly enacted expenditure limits to reverse the trend. Expenditure limits, as discussed below, bolster confidence in government, thereby increasing not only voting, but all manners of political participation.

III. THERE IS A FIRM BASIS FOR VERMONT'S CONCLUSION THAT SPENDING LIMITS AT THE STATE LEVEL BOLSTER THE REPUBLICAN FORM OF GOVERNMENT THROUGH PUBLIC INVOLVEMENT AND DELIBERATION.

The Vermont General Assembly found that campaign regulations in the form of expenditure limits enhance civic participation and voter deliberation — elements that it deemed critical to protect the integrity of its republican form of government. This is nothing new. This Court has recognized states' authority to regulate political campaigns to

promote and protect the integrity of their systems of government. *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (preventing actual and apparent corruption "directly implicate[s] 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'") (citations omitted). Vermont heeded that message in enacting Act 64. Ultimately, both legal precedent and empirical evidence support Vermont's finding that expenditure limits enhance civic participation and deliberation.

1. Expenditure limits increase civic participation and deliberation by preventing corruption or the appearance of corruption. Indeed, it is well-settled that citizens are less inclined to participate in a government that they deem corrupt. *See Nixon*, 528 U.S. at 390. Vermont understood this when it enacted the expenditure limits and concluded that "[c]itizen interest, participation and confidence in the electoral process is lessened by . . . expensive campaigns." 1997 Vt. Laws Pub. Act 64 (finding No. 10).

Empirical analysis of congressional elections demonstrates that voter turnout is the same or lower in response to higher spending. Tr. X-58 (Gross). In a national poll, two-thirds of voters believed spending limits would improve the honesty and integrity of elections. Ex. III, E-1042 (Gross Report). A separate study in Minnesota corroborated these findings: there, one-third of voters said that they are less likely to participate in the electoral process if they perceive that donors have more influence than non-donors. David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (1999).

2. Expenditure limits also increase public participation by helping to raise the level of competitiveness in electoral races. *See* American Political Science Ass'n.: Task Force on

Inequality and American Democracy, *American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 5 (2004). The limits facilitate more competitive elections by eliminating the singular importance of campaign fundraising.[7] With limits in place, challengers have a greater chance of competing with incumbents, who almost always have an advantage in raising money. *See generally Raising the Limits: A Bad Bet for Campaign Finance Reform.* Because close elections emphasize and turn on mobilization of individual voters, more people participate in close elections both as voters and grassroots organizers.

3. In addition to increasing the competitiveness of elections, expenditure limits broaden opportunities for citizens to participate as candidates for elected office, opening up elections to candidates with a wider range of viewpoints.[8] Without expenditure limits, incumbents will remain favorites in most elections in large part because of the ease with which they can raise funds and outspend opponents. An advantage based on the ability to raise campaign dollars discourages citizens from becoming challengers, particularly lower-income and lower-middle-income citizens. *See* 1997 Vt. Laws Pub. Act 64 (finding No. 1) ("Election campaigns for statewide and state legislative offices are becoming too expensive. As a result

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[7] In the 2004 election year, 97% of congressional candidates who raised more money than their opponents won their elections. U.S. PIRG Education Fund, *Raising the Limits: A Bad Bet for Campaign Finance Reform* 4, 24 (2006). Incumbents for House and Senate seats who ran for re-election were successful 98% and 96% of the time respectively, due in large part to out-raising opponents an average ratio of 4.1 to 1. *Id.*

[8] In evaluating public finance systems for political campaigns, one court explained that the electorate is "entitled to have presented to it for its evaluation and judgment candidates from all walks of life." *Bang* v. *Chase*, 442 F. Supp. 758, 764 (D. Minn. 1977).

many Vermonters are financially unable to seek election to public office."); Tr. IX-132 (Elizabeth Ready) (Unrestrained spending "precludes normal people, even people that have a lot of political experience, from getting into the running for lieutenant governor, governor, because who wants to go out and raise, . . . a hundred thousand, two hundred thousand, a half million dollars? . . . And quite frankly, who can amongst normal members of the public?"). Expenditure limits improve the opportunities for citizens to become successful challengers by reducing the importance of fundraising and personal wealth in favor of grassroots methods of campaigning that are accessible to all potential candidates. Vermont's actions to promote greater civic participation through campaign expenditure limits are reasonable and deserve deference from this Court.

4. Expenditure limits also create opportunities for greater deliberation among elected officials, thereby promoting a more republican government that thoughtfully considers the interests of a broader electorate. By eliminating the incentive to amass endless campaign dollars, expenditure limits reduce the dependence of elected officials on relationships with wealthy contributors. In a system of unlimited expenditures, the affluent are heard more loudly and clearly than their less affluent counterparts, and officials act on input from an artificially narrowed group of constituents. *See Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 441; *see also American Democracy in an Age of Rising Inequality*, at http://www.apsanet.org, 6. But in a truly representative government, elected officials make decisions that consider the viewpoints and interests of all of their constituents. When the government fails to meet this goal, it has failed to be truly republican in form. Because expenditure limits eliminate the arms race for campaign dollars, they relieve the pressure on elected officials to aggregate the interests of affluent constituents without deliberating on the interests of

the less affluent. Campaign finance reforms, particularly expenditure limits, "democratize the influence that money can bring to bear upon the electoral process." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). Likewise, less time spent raising campaign dollars means more time to consider and deliberate upon proposed laws. Because candidates and elected officials are then able to form policies based on deliberation of varying perspectives, citizens are more likely to view the government as legitimate (or free of corruption as discussed above). This, in turn, fosters broader participation, building an upward cycle of participation and legitimacy.

5. Expenditure limits also increase participation and deliberation by protecting and promoting direct voter contact. This voter contact is a critical interest for the citizens of Vermont as a means of guarding the state's republican form of government. The political culture of Vermont is built on a longstanding tradition of town hall meetings and grassroots campaigning that for centuries has increased citizen deliberation and political discourse. These traditions, fostered and carried out by the people of Vermont, inform elected officials and candidates of the diverse interests of the state's electorate. The Vermont General Assembly has continuously sought to protect this interest through legislation. Pet. App. 101a-102a (citing nearly a century of efforts to safeguard Vermont's system of government through campaign finance reform legislation).

Elected officials have admitted that the need to raise unlimited campaign funds directly limits the time they spend interacting with the average voter and the time spent deliberating on the issues and perspectives of their constituents. *See* U.S. PIRG, *The Case for Limits on Campaign Expenditures*, at http://www.buckbuckley.com (last visited Feb. 7, 2006). The Vermont General Assembly

passed Act 64 to protect the political traditions of the state, and particularly the traditions that foster deliberation and participation. The Second Circuit found that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time with voters." *See* Pet. App. 135a-144a; Tr. X-62 (Gross) ("In some of the highest [spending] congressional races, there [are] suggestions that often money is spent on factors which are not directly related to voter mobilization efforts or campaign efforts."). It is therefore reasonable and sound for Vermont to conclude that candidates, faced with expenditure limits, will better utilize their time in the interest of the electorate and spend the limited campaign dollars far more effectively through lower-cost grassroots efforts and direct voter contact.

CONCLUSION

Vermont has a compelling interest in guaranteeing a republican form of government through bolstering voter engagement and participation in elections and enhancing the debate on public and electoral issues. That interest is of constitutional significance and suffices by any measure as a compelling state interest that outweighs the interest of candidates with ample funds to spend without limit. Because that interest is so strong, and is asserted by a state with its own constitutional responsibilities in the area of republican self-governance and elections, it warrants deference by this Court. For the foregoing reasons, the Court should affirm the Second Circuit's decision with respect to Vermont's expenditure limits.

Respectfully submitted,

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Nos. 04-1528, 04-1530, and 04-1697

In the

SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, et al.,Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

VERMONT REPUBLICAN STATE COMM., et al., Petitioners
v.
WILLIAM H. SORRELL, et al., Respondents

WILLIAM H. SORRELL, et al., Petitioners
v.
NEIL RANDALL, et al., Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al., OUT OF TIME

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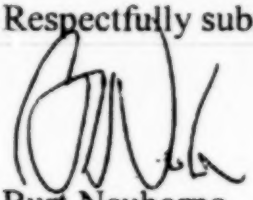
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Movants hereby request leave to file the accompanying brief *amici curiae* out of time. Pursuant to the Court's scheduling order, the brief *amici curiae* should have been filed on or before February 8, 2006. *Amici* inadvertently understood the filing date to be February 10, 2006, and filed their brief with the consent of the parties out of time on that date.

Respectfully submitted,



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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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RANDALL ET AL. *v.* SORRELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–1528. Argued February 28, 2006—Decided June 26, 2006*

Vermont's Act 64 stringently limits both the amounts that candidates for state office may spend on their campaigns and the amounts that individuals, organizations, and political parties may contribute to those campaigns. Soon after Act 64 became law, the petitioners—individuals who have run for state office, citizens who vote in state elections and contribute to campaigns, and political parties and committees participating in state politics—brought this suit against the respondents, state officials charged with enforcing the Act. The District Court held that Act 64's expenditure limits violate the First Amendment, see *Buckley* v. *Valeo*, 424 U. S. 1, and that the Act's limits on political parties' contributions to candidates were unconstitutional, but found the other contribution limits constitutional. The Second Circuit held that *all* of the Act's contribution limits are constitutional, ruled that the expenditure limits may be constitutional because they are supported by compelling interests in preventing corruption or its appearance and in limiting the time state officials must spend raising campaign funds, and remanded for the District Court to determine whether the expenditure limits were narrowly tailored to those interests.

Held: The judgment is reversed, and the cases are remanded.

382 F. 3d 91, reversed and remanded.

JUSTICE BREYER, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Parts I, II–B–3, III, and IV that both of Act 64's sets of

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*Together with No. 04–1530, *Vermont Republican State Committee et al.* v. *Sorrell et al.*, and No. 04–1697, *Sorrell et al.* v. *Randall et al.*, also on certiorari to the same court.

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limitations are inconsistent with the First Amendment. Pp. 6–8, 10–29.

1. The expenditure limits violate the First Amendment's free speech guarantees under *Buckley*. Pp. 6–8, 10–11.

(a) In *Buckley*, the Court held, *inter alia*, that the Government's asserted interest in preventing "corruption and the appearance of corruption," 424 U. S., at 25, provided sufficient justification for the contribution limitations imposed on campaigns for federal office by the Federal Election Campaign Act of 1971, *id.*, at 23–38, but that FECA's expenditure limitations violated the First Amendment, *id.*, at 39–59. The Court explained that the difference between the two kinds of limitations is that expenditure limits "impose significantly more severe restrictions on protected freedoms of political expression and association than" do contribution limits. *Id.*, at 23. Contribution limits, though a "marginal restriction," nevertheless leave the contributor "fre[e] to discuss candidates and issues." *Id.*, at 20–21. Expenditure limits, by contrast, impose "[a] restriction on the amount of money a person or group can spend on political communication," *id.*, at 19, and thereby necessarily "reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *ibid.* For over 30 years, in considering the constitutionality of a host of campaign finance statutes, this Court has adhered to *Buckley*'s constraints, including those on expenditure limits. See, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 134. Pp. 6–8.

(b) The respondents argue unpersuasively that *Buckley* should be distinguished from the present cases on a ground they say *Buckley* did not consider: that expenditure limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters. There is no significant basis for that distinction. Act 64's expenditure limits are not substantially different from those at issue in *Buckley*. Nor is Vermont's primary justification for imposing its expenditure limits significantly different from Congress' rationale for the *Buckley* limits: preventing corruption and its appearance. The respondents say unpersuasively that, had the *Buckley* Court considered the time protection rationale for expenditure limits, the Court would have upheld those limits in the FECA. The *Buckley* Court, however, was aware of the connection between expenditure limits and a reduction in fundraising time. And, in any event, the connection seems perfectly obvious. Under these circumstances, the respondents' argument amounts to no more than an invitation so to limit *Buckley's* holding as effectively to overrule it. That invitation is declined. Pp. 10–11.

2. Act 64's contribution limits violate the First Amendment because

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those limits, in their specific details, burden protected interests in a manner disproportionate to the public purposes they were enacted to advance. Pp. 11–29.

(a) In upholding the $1,000 contribution limit before it, the *Buckley* Court recognized, *inter alia*, that such limits, unlike expenditure limits, "involv[e] little direct restraint on" the contributor's speech, 424 U. S., at 21, and are permissible as long as the government demonstrates that they are "closely drawn" to match a "sufficiently important interest," *id.*, at 25. It found that the interest there advanced, "prevent[ing] corruption" and its "appearance," was "sufficiently important" to justify the contribution limits, *id.*, at 25–26, and that those limits were "closely drawn." Although recognizing that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a difference, see *id.*, at 21, the Court added that such "distinctions in degree become significant only when they . . . amount to differences in kind," *id.*, at 30. Pointing out that it had "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," *ibid.*, the Court found "no indication" that FECA's contribution limitations would have "any dramatic adverse effect on the funding of campaigns," *id.*, at 21. Since *Buckley*, the Court has consistently upheld contribution limits in other statutes, but has recognized that such limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify, see, *e.g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 395–397. Pp. 12–13.

(b) Although the Court has "no scalpel to probe," 424 U. S., at 30, with exactitude whether particular contribution limits are too low and normally defers to the legislature in that regard, it must nevertheless recognize the existence of some lower bound, as *Buckley* acknowledges. While the interests served by contribution limits, preventing corruption and its appearance, "directly implicate the integrity of our electoral process," *McConnell*, *supra*, at 136, that does not simply mean the lower the limit, the better. Contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," *i.e.*, toward assessing the restrictions' proportionality. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499. Danger signs that Act 64's contribution limits may fall outside tolerable First

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Amendment limits are present here. They are substantially lower than both the limits the Court has previously upheld and the comparable limits in force in other States. Consequently, the record must be examined to determine whether Act 64's contribution limits are "closely drawn" to match the State's interests. Pp. 13–19.

(c) The record demonstrates that, from a constitutional perspective, Act 64's contribution limits are too restrictive. Five sets of factors, taken together, lead to the conclusion that those limits are not narrowly tailored. *First*, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. *Second*, Act 64's insistence that a political party and all of its affiliates together abide by *exactly* the same low $200 to $400 contribution limits that apply to individual contributors threatens harm to a particularly important political right, the right to associate in a political party. See, *e.g.*, *California Democratic Party* v. *Jones*, 530 U. S. 567, 574. Although the Court upheld federal limits on political parties' contributions to candidates in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, the limits there at issue were far less problematic, for they were significantly higher than Act 64's limits, see, *e.g.*, *id.*, at 438–439, and n. 3, and they were much higher than the federal limits on contributions from individuals to candidates, see *id.*, at 453. *Third*, Act 64's treatment of volunteer services aggravates the problem. Although the Act excludes uncompensated volunteer services from its "contribution" definition, it does not exclude the expenses volunteers incur, *e.g.*, travel expenses, in the course of campaign activities. The combination of very low contribution limits and the absence of an exception excluding volunteer expenses may well impede a campaign's ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way. Cf. *Buckley*, *supra*, at 22. *Fourth*, unlike the contribution limits upheld in *Shrink*, Act 64's limits are not adjusted for inflation, but decline in real value each year. A failure to index limits means that limits already suspiciously low will almost inevitably become too low over time. *Fifth*, nowhere in the record is there any special justification for Act 64's low and restrictive contribution limits. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley*. Indeed, other things being equal, one might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases the Court has considered. Pp. 19–28.

(d) It is not possible to sever some of the Act's contribution limit

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provisions from others that might remain fully operative. Doing so would require the Court to write words into the statute (inflation indexing), to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the Vermont Legislature might respond to the constitutional objections to Act 64. In these circumstances, the legislature likely would not have intended the Court to set aside the statute's contribution limits. The legislature is free to rewrite those provisions to address the constitutional difficulties here identified. Pp. 28–29.

JUSTICE BREYER, joined by THE CHIEF JUSTICE in Parts II–B–1 and II–B–2, rejected the respondents' argument that *Buckley* should, in effect, be overruled because subsequent experience has shown that contribution limits alone cannot effectively deter corruption or its appearance. *Stare decisis*, the basic legal principle commanding judicial respect for a court's earlier decisions and their rules of law, prevents the overruling of *Buckley*. Adherence to precedent is the norm; departure from it is exceptional, requiring "special justification," *Arizona* v. *Rumsey*, 467 U. S. 203, 212, especially where, as here, the principle at issue has become settled through iteration and reiteration over a long period. There is no special justification here. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443. Nor is there any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. Cf. *McConnell*, *supra*. Finally, overruling *Buckley* now would dramatically undermine the considerable reliance that Congress and state legislatures have placed upon it in drafting campaign finance laws. And this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Pp. 8–10.

JUSTICE ALITO agreed that Act 64's expenditure and contribution limits violate the First Amendment, but concluded that respondents' backup argument asking this Court to revisit *Buckley* v. *Valeo*, 424 U. S. 1, need not be reached because they have failed to address considerations of *stare decisis*. Pp. 1–2.

JUSTICE KENNEDY agreed that Vermont's limitations on campaign expenditures and contributions violate the First Amendment, but concluded that, given his skepticism regarding this Court's campaign finance jurisprudence, see, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 286–287, 313, it is appropriate for him to concur only in the judgment. Pp. 1–3.

JUSTICE THOMAS, joined by JUSTICE SCALIA, agreed that Vermont's

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Act 64 is unconstitutional, but disagreed with the plurality's rationale for striking down that statute. *Buckley* v. *Valeo*, 424 U. S. 1, provides insufficient protection to political speech, the core of the First Amendment, is therefore illegitimate and not protected by *stare decisis*, and should be overruled and replaced with a standard faithful to the Amendment. This Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. See, *e.g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410–418. Both the contribution and expenditure restrictions of Act 64 should be subjected to strict scrutiny, which they would fail. See, *e.g.*, *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 640–641. Pp. 1–10.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., joined, and in which ALITO, J., joined as to all but Parts II–B–1 and II–B–2. ALITO, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which STEVENS, J., joined as to Parts II and III.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

NEIL RANDALL, ET AL., PETITIONERS
04–1528 *v.*
WILLIAM H. SORRELL ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL., PETITIONERS
04–1530 *v.*
WILLIAM H. SORRELL ET AL.

WILLIAM H. SORRELL, ET AL., PETITIONERS
04–1697 *v.*
NEIL RANDALL ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE BREYER announced the judgment of the Court, and delivered an opinion in which THE CHIEF JUSTICE joins, and in which JUSTICE ALITO joins except as to Parts II–B–1 and II–B–2.

We here consider the constitutionality of a Vermont campaign finance statute that limits both (1) the amounts that candidates for state office may spend on their campaigns (expenditure limitations) and (2) the amounts that individuals, organizations, and political parties may contribute to those campaigns (contribution limitations). Vt. Stat. Ann., Tit. 17, §2801 *et seq.* (2002). We hold that both

sets of limitations are inconsistent with the First Amendment. Well-established precedent makes clear that the expenditure limits violate the First Amendment. *Buckley* v. *Valeo*, 424 U. S. 1, 54–58 (1976) *(per curiam)*. The contribution limits are unconstitutional because in their specific details (involving low maximum levels and other restrictions) they fail to satisfy the First Amendment's requirement of careful tailoring. *Id.*, at 25–30. That is to say, they impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe.

I

A

Prior to 1997, Vermont's campaign finance law imposed no limit upon the amount a candidate for state office could spend. It did, however, impose limits upon the amounts that individuals, corporations, and political committees could contribute to the campaign of such a candidate. Individuals and corporations could contribute no more than $1,000 to any candidate for state office. §2805(a) (1996). Political committees, excluding political parties, could contribute no more than $3,000. §2805(b). The statute imposed no limit on the amount that political parties could contribute to candidates.

In 1997, Vermont enacted a more stringent campaign finance law, Pub. Act No. 64, codified at Vt. Stat. Ann., Tit. 17, §2801 *et seq.* (2002) (hereinafter Act or Act 64), the statute at issue here. Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," *i.e.*, the primary plus the general election, in approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4,000 (plus an additional $2,500

for each additional seat in the district); state representative (two-member district), $3,000; and state representative (single member district), $2,000. §2805a(a). These limits are adjusted for inflation in odd-numbered years based on the Consumer Price Index. §2805a(e). Incumbents seeking reelection to statewide office may spend no more than 85% of the above amounts, and incumbents seeking reelection to the State Senate or House may spend no more than 90% of the above amounts. §2805a(c). The Act defines "[e]xpenditure" broadly to mean the

> "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." §2801(3).

With certain minor exceptions, expenditures over $50 made on a candidate's behalf by others count against the candidate's expenditure limit if those expenditures are "intentionally facilitated by, solicited by or approved by" the candidate's campaign. §§2809(b), (c). These provisions apply so as to count against a campaign's expenditure limit any spending by political parties or committees that is coordinated with the campaign and benefits the candidate. And any party expenditure that "primarily benefits six or fewer candidates who are associated with the political party" is "presumed" to be coordinated with the campaign and therefore to count against the campaign's expenditure limit. §§2809(b), (d).

Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is limited as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200.

§2805(a). Unlike its expenditure limits, Act 64's contribution limits are not indexed for inflation.

A political committee is subject to these same limits. *Ibid.* So is a political party, *ibid.*, defined broadly to include "any subsidiary, branch or local unit" of a party, as well as any "national or regional affiliates" of a party (taken separately or together). §2801(5). Thus, for example, the statute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate's campaign for governor (during the primary and the general election together) to $400.

The Act also imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle. §2805(a).

The Act defines "contribution" broadly in approximately the same way it defines "expenditure." §2801(2). Any expenditure made on a candidate's behalf counts as a contribution to the candidate if it is "intentionally facilitated by, solicited by or approved by" the candidate. §§2809(a), (c). And a party expenditure that "primarily benefits six or fewer candidates who are associated with the" party is "presumed" to count against the party's contribution limits. §§2809(a), (d).

There are a few exceptions. A candidate's own contributions to the campaign and those of the candidate's family fall outside the contribution limits. §2805(f). Volunteer services do not count as contributions. §2801(2). Nor does the cost of a meet-the-candidate function, provided that the total cost for the function amounts to $100 or less. §2809(d).

In addition to these expenditure and contribution limits, the Act sets forth disclosure and reporting requirements and creates a voluntary public financing system for gubernatorial elections. §§2803, 2811, 2821–2823, 2831, 2832, 2851–2856. None of these is at issue here. The Act

also limits the amount of contributions a candidate, political committee, or political party can receive from out-of-state sources. §2805(c). The lower courts held these out-of-state contribution limits unconstitutional, and the parties do not challenge that holding.

B

The petitioners are individuals who have run for state office in Vermont, citizens who vote in Vermont elections and contribute to Vermont campaigns, and political parties and committees that participate in Vermont politics. Soon after Act 64 became law, they brought this lawsuit in Federal District Court against the respondents, state officials charged with enforcement of the Act. Several other private groups and individual citizens intervened in the District Court proceedings in support of the Act and are joined here as respondents as well.

The District Court agreed with the petitioners that the Act's expenditure limits violate the First Amendment. See *Buckley*, 424 U. S. 1. The court also held unconstitutional the Act's limits on the contributions of political parties to candidates. At the same time, the court found the Act's other contribution limits constitutional. *Landell* v. *Sorrell*, 118 F. Supp. 2d 470 (Vt. 2000).

Both sides appealed. A divided panel of the Court of Appeals for the Second Circuit held that *all* of the Act's contribution limits are constitutional. It also held that the Act's expenditure limits may be constitutional. *Landell* v. *Sorrell*, 382 F. 3d 91 (2004). It found those limits supported by two compelling interests, namely, an interest in preventing corruption or the appearance of corruption and an interest in limiting the amount of time state officials must spend raising campaign funds. The Circuit then remanded the case to the District Court with instructions to determine whether the Act's expenditure limits were narrowly tailored to those interests.

The petitioners and respondents all sought certiorari. They asked us to consider the constitutionality of Act 64's expenditure limits, its contribution limits, and a related definitional provision. We agreed to do so. 545 U. S. ___ (2005).

II

We turn first to the Act's expenditure limits. Do those limits violate the First Amendment's free speech guarantees?

A

In *Buckley* v. *Valeo*, *supra*, the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, as amended, 2 U. S. C. §431 *et seq.*, a statute that, much like the Act before us, imposed both expenditure and contribution limitations on campaigns for public office. The Court, while upholding FECA's contribution limitations as constitutional, held that the statute's expenditure limitations violated the First Amendment.

Buckley stated that both kinds of limitations "implicate fundamental First Amendment interests." 424 U. S., at 23. It noted that the Government had sought to justify the statute's infringement on those interests in terms of the need to prevent "corruption and the appearance of corruption." *Id.*, at 25; see also *id.*, at 55. In the Court's view, this rationale provided sufficient justification for the statute's contribution limitations, but it did not provide sufficient justification for the expenditure limitations.

The Court explained that the basic reason for this difference between the two kinds of limitations is that expenditure limitations "impose significantly more severe restrictions on protected freedoms of political expression and association than" do contribution limitations. *Id.*, at 23. Contribution limitations, though a "marginal restric-

tion upon the contributor's ability to engage in free communication," nevertheless leave the contributor "fre[e] to discuss candidates and issues." *Id.*, at 20–21. Expenditure limitations, by contrast, impose "[a] restriction on the amount of money a person or group can spend on political communication during a campaign." *Id.*, at 19. They thereby necessarily "reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Ibid.* Indeed, the freedom "to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at 19, n. 18.

The Court concluded that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by" the statute's expenditure limitations. *Id.*, at 55. It decided that the Government's primary justification for expenditure limitations, preventing corruption and its appearance, was adequately addressed by the Act's contribution limitations and disclosure requirements. *Ibid.* The Court also considered other governmental interests advanced in support of expenditure limitations. It rejected each. *Id.*, at 56–57. Consequently, it held that the expenditure limitations were "constitutionally invalid." *Id.*, at 58.

Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints, including those on expenditure limits. See *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 134 (2003); *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441 (2001) *(Colorado II)*; *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386 (2000) *(Shrink)*; *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 610 (1996) *(Colorado I)* (plurality opinion); *Federal Elec-*

tion Comm'n v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 259–260 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 491 (1985) *(NCPAC); California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 194–195 (1981) (plurality opinion).

B

1

The respondents recognize that, in respect to expenditure limits, *Buckley* appears to be a controlling—and unfavorable—precedent. They seek to overcome that precedent in two ways. First, they ask us in effect to overrule *Buckley*. Post-*Buckley* experience, they believe, has shown that contribution limits (and disclosure requirements) alone cannot effectively deter corruption or its appearance; hence experience has undermined an assumption underlying that case. Indeed, the respondents have devoted several pages of their briefs to attacking *Buckley*'s ho'ding on expenditure limits. See Brief for Respondent-Cross-Petitioner Vermont Public Interest Research Group et al. 36–39 (arguing that "sound reasons exist to revisit the applicable standard of review" for expenditure limits); Brief for Respondent-Cross-Petitioner William Sorrell et al. 28–31 (arguing that "the Court should revisit *Buckley* and consider alternative constitutional approaches to spending limits").

Second, in the alternative, they ask us to limit the scope of *Buckley* significantly by distinguishing *Buckley* from the present case. They advance as a ground for distinction a justification for expenditure limitations that, they say, *Buckley* did not consider, namely that such limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters. We find neither argument persuasive.

2

The Court has often recognized the "fundamental importance" of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. See *Harris* v. *United States*, 536 U. S. 545, 556–557 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that *stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 856 (1996) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

We can find here no such special justification that would require us to overrule *Buckley*. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). We cannot find in the respondents' claims any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. Cf. *McConnell* v. *FEC*, 540 U. S. 93. At the same time, *Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when

drafting campaign finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.

For all these reasons, we find this a case that fits the *stare decisis* norm. And we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent. We consequently decline the respondents' invitation to reconsider *Buckley*.

3

The respondents also ask us to distinguish these cases from *Buckley*. But we can find no significant basis for that distinction. Act 64's expenditure limits are not substantially different from those at issue in *Buckley*. In both instances the limits consist of a dollar cap imposed upon a candidate's expenditures. Nor is Vermont's primary justification for imposing its expenditure limits significantly different from Congress' rationale for the *Buckley* limits: preventing corruption and its appearance.

The sole basis on which the respondents seek to distinguish *Buckley* concerns a further supporting justification. They argue that expenditure limits are necessary in order to reduce the amount of time candidates must spend raising money. Brief for Respondent/Cross-Petitioner Vermont Public Interest Research Group et al. 16–20; Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 22–25. Increased campaign costs, together with the fear of a better-funded opponent, mean that, without expenditure limits, a candidate must spend too much time raising money instead of meeting the voters and engaging in public debate. *Buckley*, the respondents add, did not fully consider this justification. Had it done so, they say, the Court would have upheld, not struck down, FECA's expenditure limits.

In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*'s result. The *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time. In a section of the opinion dealing with FECA's public financing provisions, it wrote that Congress was trying to "free candidates from the rigors of fundraising." 424 U. S., at 91; see also *id.*, at 96 ("[L]imits on contributions necessarily increase the burden of fundraising," and "public financing" was designed in part to relieve Presidential candidates "from the rigors of soliciting private contributions"); *id.*, at 258–259 (White, J., concurring in part and dissenting in part) (same). The Court of Appeals' opinion and the briefs filed in this Court pointed out that a natural consequence of higher campaign expenditures was that "candidates were compelled to allow to fund raising increasing and extreme amounts of money and energy." *Buckley* v. *Valeo*, 519 F. 2d 821, 838 (CADC 1975); see also Brief for United States et al. as *Amici Curiae* in *Buckley* v. *Valeo*, O. T. 1975, Nos. 75–436 and 75–437, p. 36 ("Fund raising consumes candidate time that otherwise would be devoted to campaigning"). And, in any event, the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious.

Under these circumstances, the respondents' argument amounts to no more than an invitation so to limit *Buckley*'s holding as effectively to overrule it. For the reasons set forth above, we decline that invitation as well. And, given *Buckley*'s continued authority, we must conclude that Act 64's expenditure limits violate the First Amendment.

III

We turn now to a more complex question, namely the constitutionality of Act 64's contribution limits. The par-

ties, while accepting *Buckley*'s approach, dispute whether, despite *Buckley*'s general approval of statutes that limit campaign contributions, Act 64's contribution limits are so severe that in the circumstances its particular limits violate the First Amendment.

A

As with the Act's expenditure limits, we begin with *Buckley*. In that case, the Court upheld the $1,000 contribution limit before it. *Buckley* recognized that contribution limits, like expenditure limits, "implicate fundamental First Amendment interests," namely, the freedoms of "political expression" and "political association." 424 U. S., at 15, 23. But, unlike expenditure limits (which "necessarily reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id.*, at 19), contribution limits "involv[e] little direct restraint on" the contributor's speech, *id.*, at 21. They do restrict "one aspect of the contributor's freedom of political association," namely, the contributor's ability to support a favored candidate, but they nonetheless "permi[t] the symbolic expression of support evidenced by a contribution," and they do "not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*, at 21, 24.

Consequently, the Court wrote, contribution limitations are permissible as long as the Government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Id.*, at 25. It found that the interest advanced in the case, "prevent[ing] corruption" and its "appearance," was "sufficiently important" to justify the statute's contribution limits. *Id.*, at 25–26.

The Court also found that the contribution limits before it were "closely drawn." It recognized that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a

difference. Indeed, it wrote that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.*, at 21. But the Court added that such "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*, at 30. Pointing out that it had "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," *ibid.*, the Court found "no indication" that the $1,000 contribution limitations imposed by the Act would have "any dramatic adverse effect on the funding of campaigns," *id.*, at 21. It therefore found the limitations constitutional.

Since *Buckley*, the Court has consistently upheld contribution limits in other statutes. *Shrink*, 528 U. S. 377 ($1075 limit on contributions to candidates for Missouri state auditor); *California Medical Assn.*, 453 U. S. 182 ($5,000 limit on contributions to multicandidate political committees). The Court has recognized, however, that contribution limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify. See *Shrink*, *supra*, at 395–397; *Buckley*, *supra*, at 21. And individual Members of the Court have expressed concern lest too low a limit magnify the "reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge." *Shrink*, *supra*, at 403–404 (BREYER, J., joined by GINSBURG, J., concurring). In the cases before us, the petitioners challenge Act 64's contribution limits on that basis.

B

Following *Buckley*, we must determine whether Act 64's contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy," 424 U. S., at 21; whether they magnify the advantages of

incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny. In answering these questions, we recognize, as *Buckley* stated, that we have "no scalpel to probe" each possible contribution level. *Id.*, at 30. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments, as legislators have "particular expertise" in matters related to the costs and nature of running for office. *McConnell*, 540 U. S., at 137. Thus ordinarily we have deferred to the legislature's determination of such matters.

Nonetheless, as *Buckley* acknowledged, we must recognize the existence of some lower bound. At some point the constitutional risks to the democratic electoral process become too great. After all, the interests underlying contribution limits, preventing corruption and the appearance of corruption, "directly implicate the integrity of our electoral process." *McConnell, supra*, at 136 (internal quotation marks omitted). Yet that rationale does not simply mean "the lower the limit, the better." That is because contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye

toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) ("[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'" (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–286 (1964))).

We find those danger signs present here. As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64's limits are sufficiently low as to generate suspicion that they are not closely drawn. The Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate (with significantly lower limits for contributions to candidates for State Senate and House of Representatives, see *supra*, at 3). These limits apply both to contributions from individuals and to contributions from political parties, whether made in cash or in expenditures coordinated (or presumed to be coordinated) with the candidate. See *supra*, at 3–4.

These limits are well below the limits this Court upheld in *Buckley*. Indeed, in terms of real dollars (*i.e.*, adjusting for inflation), the Act's $200 per election limit on individual contributions to a campaign for governor is slightly more than one-twentieth of the limit on contributions to campaigns for federal office before the Court in *Buckley*. Adjusted to reflect its value in 1976 (the year *Buckley* was decided), Vermont's contribution limit on campaigns for statewide office (including governor) amounts to $113.91 per 2-year election cycle, or roughly $57 per election, as compared to the $1,000 per election limit on individual

contributions at issue in *Buckley*. (The adjusted value of Act 64's limit on contributions from political parties to candidates for statewide office, again $200 per candidate per election, is just over one one-hundredth of the comparable limit before the Court in *Buckley*, $5,000 per election.) Yet Vermont's gubernatorial district—the entire State—is no smaller than the House districts to which *Buckley*'s limits applied. In 1976, the average congressional district contained a population of about 465,000. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 459 (1976) (Statistical Abstract) (describing results of 1970 census). Indeed, Vermont's population is 621,000—about one-third *larger*. Statistical Abstract 21 (2006) (describing Vermont's population in 2004).

Moreover, considered as a whole, Vermont's contribution limits are the lowest in the Nation. Act 64 limits contributions to candidates for statewide office (including governor) to $200 per candidate per election. We have found no State that imposes a lower per election limit. Indeed, we have found only seven States that impose limits on contributions to candidates for statewide office at or below $500 per election, more than twice Act 64's limit. Cf. Ariz. Rev. Stat. Ann. §16–905 (West Cum. Supp. 2005) ($760 per election cycle, or $380 per election, adjusted for inflation); Colo. Const., Art. XXVIII, §3 ($500 per election, adjusted for inflation); Fla. Stat. §106.08(1)(a) (2003) ($500 per election); Me. Rev. Stat. Ann., Tit. 21A, §1015(1) (1993) ($500 for governor, $250 for other statewide office, per election); Mass. Gen. Laws, ch. 55, §7A (West Supp. 2006) ($500 per year, or $250 per election); Mont. Code Ann. §13–37–216(1)(a) (2005) ($500 for governor, $250 for other statewide office, per election); S. D. Codified Laws §12–25–1.1 (2004) ($1,000 per year, or $500 per election). We are aware of no State that imposes a limit on contributions from political parties to candidates for statewide office

lower than Act 64's $200 per candidate per election limit. Cf. Me. Rev. Stat. Ann., Tit. 21A, §1015(1) (1993) (next lowest: $500 for contribution from party to candidate for governor, $250 for contribution from party to candidate for other statewide office, both per election). Similarly, we have found only three States that have limits on contributions to candidates for state legislature below Act 64's $150 and $100 per election limits. Ariz. Rev. Stat. Ann. §16–905 (West Cum. Supp. 2005) ($296 per election cycle, or $148 per election); Mont. Code Ann. §13–37–216(1)(a) (2005) ($130 per election); S. D. Codified Laws §12–25–1.1 (2004) ($250 per year, or $125 per election). And we are aware of no State that has a lower limit on contributions from political parties to state legislative candidates. Cf. Me. Rev. Stat. Ann., Tit. 21A, §1015(1) (1993) (next lowest: $250 per election).

Finally, Vermont's limit is well below the lowest limit this Court has previously upheld, the limit of $1,075 per election (adjusted for inflation every two years, see Mo. Rev. Stat. §130.032.2 (1998 Cum. Supp.)) for candidates for Missouri state auditor. *Shrink*, 528 U. S. 377. The comparable Vermont limit of roughly $200 per election, not adjusted for inflation, is less than one-sixth of Missouri's current inflation-adjusted limit ($1,275).

We recognize that Vermont's population is much smaller than Missouri's. Indeed, Vermont is about one-ninth of the size of Missouri. Statistical Abstract 21 (2006). Thus, *per citizen*, Vermont's limit is slightly more generous. As of 2006, the ratio of the contribution limit to the size of the constituency in Vermont is .00064, while Missouri's ratio is .00044, 31% lower. Cf. App. 55 (doing same calculation in 2000).

But this does not necessarily mean that Vermont's limits are less objectionable than the limit upheld in *Shrink*. A campaign for state auditor is likely to be less costly than a campaign for governor; campaign costs do

not automatically increase or decrease in precise proportion to the size of an electoral district. See App. 66 (1998 winning candidate for Vermont state auditor spent about $60,000; winning candidate for governor spent about $340,000); Opensecrets.org, The Big Picture, 2004 Cycle: Hot Races, available at http://www.opensecrets.org/bigpicture/hotraces.asp?cycle=2004 (as visited June 22, 2006, and available in Clerk of Court's case file) (U. S. Senate campaigns identified as competitive spend less per voter than U. S. House campaigns identified as competitive). Moreover, Vermont's limits, unlike Missouri's limits, apply in the same amounts to contributions made by political parties. Mo. Rev. Stat. §130.032.4 (2000) (enacting limits on contributions from political parties to candidates 10 times higher than limits on contributions from individuals). And, as we have said, Missouri's (current) $1,275 per election limit, unlike Vermont's $200 per election limit, is indexed for inflation. See *supra*, at 17; see also Mo. Rev. Stat. §130.032.2 (2000).

The factors we have mentioned offset any neutralizing force of population differences. At the very least, they make it difficult to treat *Shrink*'s (then) $1,075 limit as providing affirmative support for the lawfulness of Vermont's far lower levels. Cf. 528 U. S., at 404 (BREYER, J., concurring) (The *Shrink* "limit . . . is low enough to raise . . . a [significant constitutional] question"). And even were that not so, Vermont's failure to index for inflation means that Vermont's levels would soon be far lower than Missouri's regardless of the method of comparison.

In sum, Act 64's contribution limits are substantially lower than both the limits we have previously upheld and comparable limits in other States. These are danger signs that Act 64's contribution limits may fall outside tolerable First Amendment limits. We consequently must examine the record independently and carefully to determine whether Act 64's contribution limits are "closely drawn" to

match the State's interests.

C

Our examination of the record convinces us that, from a constitutional perspective, Act 64's contribution limits are too restrictive. We reach this conclusion based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections. *Taken together*, Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives. In particular, five factors together lead us to this decision.

First, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. For one thing, the petitioners' expert, Clark Bensen, conducted a race-by-race analysis of the 1998 legislative elections (the last to take place before Act 64 took effect) and concluded that Act 64's contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income. See 3 Tr. 52–57 (estimating loss of 47% of funds for candidate Tully, 50% for Harvey, 53% for Welch, 19% for Bahre, 29% for Delaney, 36% for LaRocque, 18% for Smith, and 31% for Brown).

For another thing, the petitioners' expert witnesses produced evidence and analysis showing that Vermont political parties (particularly the Republican Party) "target" their contributions to candidates in competitive races, that those contributions represent a significant amount of total candidate funding in such races, and that the contri-

bution limits will cut the parties' contributions to competitive races dramatically. See 1 *id.*, at 189–190; 3 *id.*, at 50–51; 8 *id.*, at 139; 10 *id.*, at 150; see also, *e.g.*, Gierzynski & Breaux, The Role of Parties in Legislative Campaign Financing, 15 Am. Rev. Politics 171 (1994); Thompson, Cassie, & Jewell, A Sacred Cow or Just a Lot of Bull? Party and PAC Money in State Legislative Elections, 47 Pol. Sci. Q. 223 (1994). Their statistics showed that the party contributions accounted for a significant percentage of the total campaign income in those races. And their studies showed that Act 64's contribution limits would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).

More specifically, Bensen pointed out that in 1998, the Republican Party made contributions to 19 Senate campaigns in amounts that averaged $2,001, which on average represented 16% of the recipient campaign's total income. 3 Tr. 84. Act 64 would reduce these contributions to $300 per campaign, an average reduction of about 85%. *Ibid.* The party contributed to 50 House campaigns in amounts averaging $787, which on average represented 28% of the recipient campaign's total income. *Id.*, at 85. Act 64 would reduce these contributions to $200 per campaign, an average reduction of 74.5%. *Ibid.* And the party contributed $40,600 to its gubernatorial candidate, an amount that accounted for about 16% of the candidate's funding. *Id.*, at 86. The Act would have reduced that contribution by 99%, to $400.

Bensen added that 57% of all 1998 Senate campaigns and 30% of all House campaigns exceeded Act 64's expenditure limits, which were enacted along with the statute's contribution limits. 7 Trial Exhs. in No. 00–9159(L) etc. (CA2), Exh. 8, p. 2351. Moreover, 27% of all Senate campaigns and 10% of all House campaigns spent more than double those limits. *Ibid.*

The respondents did not contest these figures. Rather, they presented evidence that focused, not upon *strongly contested* campaigns, but upon the funding amounts available for the *average* campaign. The respondents' expert, Anthony Gierzynski, concluded, for example, that Act 64 would have a "minimal effect on . . . candidates' ability to raise funds." App. 46. But he rested this conclusion upon his finding that "only a small proportion of" *all* contributions to *all* campaigns for state office "made during the last three elections would have been affected by the new limits." *Id.*, at 47; see also *id.*, at 51 (discussing "*average* amount of revenues lost to the limits" in legislative races (emphasis added)); *id.*, at 52–53 (discussing total number of campaigns receiving contributions over Act 64's limit). The lower courts similarly relied almost exclusively on averages in assessing Act 64's effect. See 118 F. Supp. 2d, at 470 ("Approximately 88% to 96% of the campaign contributions *to recent House races* were under $200" (emphasis added)); *id.*, at 478 ("Expert testimony revealed that over the last three election cycles the percentage *of all candidates' contributions* received over the contribution limits was less than 10%" (emphasis added)).

The respondents' evidence leaves the petitioners' evidence unrebutted in certain key respects. That is because the critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race. See, *e.g.*, N. Ornstein, T. Mann, & M. Malbin, Vital Statistics on Congress 2001–2002, pp. 89–98 (2002) (data showing that spending in competitive elections, *i.e.*, where incumbent wins with less than 60% of vote or where incumbent loses, is far greater than in most

elections, where incumbent wins with more than 60% of the vote). We concede that the record does contain some anecdotal evidence supporting the respondents' position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can "amas[s] the resources necessary for effective advocacy," *Buckley*, 424 U. S., at 21. But the facts of that particular election are not described in sufficient detail to offer a convincing refutation of the implication arising from the petitioners' experts' studies.

Rather, the petitioners' studies, taken together with low *average* Vermont campaign expenditures and the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent, raise a reasonable inference that the contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections. Cf. Ornstein, *supra*, at 87–96 (In 2000 U. S. House and Senate elections, successful challengers spent far more than the average candidate). Information about average races does not rebut that inference. Consequently, the inference amounts to one factor (among others) that here counts against the constitutional validity of the contribution limits.

Second, Act 64's insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party. See, *e.g.*, *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates); *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 357 (1997) (same); *Colorado I*, 518 U. S., at 616 (same); *Norman* v. *Reed*, 502 U. S. 279, 288 (1992) (same). Cf. *Buckley*, *supra*, at 20–22 (contribution limits constitute "only a marginal restriction" on First Amendment rights

because contributor remains free to associate politically, *e.g.*, in a political party, and "assist personally" in the party's "efforts on behalf of candidates").

The Act applies its $200 to $400 limits—precisely the same limits it applies to an individual—to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, §2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives. The Act includes within these limits not only direct monetary contributions but also expenditures in kind: stamps, stationery, coffee, doughnuts, gasoline, campaign buttons, and so forth. See §2801(2). Indeed, it includes all party expenditures "intended to promote the election of a specific candidate or group of candidates" as long as the candidate's campaign "facilitate[s]," "solicit[s]," or "approve[s]" them. §§2809(a), (c). And a party expenditure that "primarily benefits six or fewer candidates who are associated with the" party is "presumed" to count against the party's contribution limits. §2809(d).

In addition to the negative effect on "amassing funds" that we have described, see *supra*, at 18–21, the Act would severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs. And, to an unusual degree, it would discourage those who wish to contribute small amounts of money to a party, amounts that easily comply with individual contribution limits. Suppose that many individuals do not know Vermont legislative candidates personally, but wish

to contribute, say, $20 or $40, to the State Republican Party, with the intent that the party use the money to help elect whichever candidates the party believes would best advance its ideals and interests—the basic object of a political party. Or, to take a more extreme example, imagine that 6,000 Vermont citizens each want to give $1 to the State Democratic Party because, though unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Democratic state legislature. And further imagine that the party believes control of the legislature will depend on the outcome of three (and only three) House races. The Act forbids the party from giving $2,000 (of the $6,000) to each of its candidates in those pivotal races. Indeed, it permits the party to give no more than $200 to each candidate, thereby thwarting the aims of the 6,000 donors from making a meaningful contribution to state politics by giving a small amount of money to the party they support. Thus, the Act would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate. See *supra*, at 19.

We recognize that we have previously upheld limits on contributions from political parties to candidates, in particular the federal limits on coordinated party spending. *Colorado II*, 533 U. S. 431. And we also recognize that any such limit will negatively affect *to some extent* the fund-allocating party function just described. But the contribution limits at issue in *Colorado II* were far less problematic, for they were significantly higher than Act 64's limits. See *id.*, at 438–439, and n. 3, 442, n. 7 (at least $67,560 in coordinated spending and $5,000 in direct cash contributions for U. S. Senate candidates, at least $33,780 in coordinated spending and $5,000 in direct cash contributions for U. S. House candidates). And they were much higher than the federal limits on contributions from indi-

viduals to candidates, thereby reflecting an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties "to circumvent contribution limits that apply to individuals." *Id.*, at 453. Act 64, by placing identical limits upon contributions to candidates, whether made by an individual or by a political party, gives to the former consideration *no weight at all.*

We consequently agree with the District Court that the Act's contribution limits "would reduce the voice of political parties" in Vermont to a "whisper." 118 F. Supp. 2d, at 487. And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

Third, the Act's treatment of volunteer services aggravates the problem. Like its federal statutory counterpart, the Act excludes from its definition of "contribution" all "services provided without compensation by individuals volunteering their time on behalf of a candidate." Vt. Stat. Ann., Tit. 17, §2801(2) (2002). Cf. 2 U. S. C. §431(8)(B)(i) (2000 ed. and Supp. III) (similar exemption in federal campaign finance statute). But the Act does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities. The Act's broad definitions would seem to count those expenses against the volunteer's contribution limit, at least where the spending was facilitated or approved by campaign officials. Vt. Stat. Ann., Tit. 17, §2801(3) (2002) ("[E]xpenditure" includes "anything of value, paid . . . for the purpose of influencing an election"); §§2809(a), (c) (Any "expenditure . . . intentionally facilitated by, solicited by or approved by the candidate" counts as a "contribution"). And, unlike the Federal Government's treatment of comparable requirements, the State has not (insofar as we are

aware) created an exception excluding such expenses. Cf. 2 U. S. C. §§431(8)(B)(iv), (ix) (2000 ed. and Supp. III) (excluding from the definition of "contribution" volunteer travel expenses up to $1,000 and payment by political party for campaign materials used in connection with volunteer activities).

The absence of some such exception may matter in the present context, where contribution limits are very low. That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign. Cf. Vt. Stat. Ann., Tit. 17, §2809(d) (2002) (excluding expenditures for such activities only up to $100). Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals $200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, "Campaign laws violated," that works serious harm to the candidate.

These sorts of problems are unlikely to affect the constitutionality of a limit that is reasonably high. Cf. *Buckley*, 424 U. S., at 36–37 (Coordinated expenditure by a volunteer "provides material financial assistance to a candidate," and therefore "may properly be viewed as a contribution"). But Act 64's contribution limits are so low, and its definition of "contribution" so broad, that the Act may well impede a campaign's ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way. Cf. *id.*, at 22 (Federal contribution limits "leave the contributor free to become a member of

any political association and to assist personally in the association's efforts on behalf of candidates"). Again, the very low limits at issue help to transform differences in degree into difference in kind. And the likelihood of unjustified interference in the present context is sufficiently great that we must consider the lack of tailoring in the Act's definition of "contribution" as an added factor counting against the constitutional validity of the contribution limits before us.

Fourth, unlike the contribution limits we upheld in *Shrink,* see *supra,* at 16, Act 64's contribution limits are not adjusted for inflation. Its limits decline in real value each year. Indeed, in real dollars the Act's limits have already declined by about 20% ($200 in 2006 dollars has a real value of $160.66 in 1997 dollars). A failure to index limits means that limits which are already suspiciously low, see *supra,* at 14–17, will almost inevitably become too low over time. It means that future legislation will be necessary to stop that almost inevitable decline, and it thereby imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges.

Fifth, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley.* The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere. Indeed, other things being equal, one might reasonably believe that a contribution of say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger con-

tributions at issue in the other campaign finance cases we have considered. See *supra*, at 15–17.

These five sets of considerations, taken together, lead us to conclude that Act 64's contribution limits are not narrowly tailored. Rather, the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. Vermont does not point to a legitimate statutory objective that might justify these special burdens. We understand that many, though not all, campaign finance regulations impose certain of these burdens to some degree. We also understand the legitimate need for constitutional leeway in respect to legislative line-drawing. But our discussion indicates why we conclude that Act 64 in this respect nonetheless goes too far. It disproportionately burdens numerous First Amendment interests, and consequently, in our view, violates the First Amendment.

We add that we do not believe it possible to sever some of the Act's contribution limit provisions from others that might remain fully operative. See *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932) ("invalid part may be dropped if what is left is fully operative as a law"); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999) (severability "essentially an inquiry into legislative intent"); Vt. Stat. Ann., Tit. 1, §215 (2003) (severability principles apply to Vermont statutes). To sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found.

Given these difficulties, we believe the Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.

IV

We conclude that Act 64's expenditure limits violate the First Amendment as interpreted in *Buckley* v. *Valeo*. We also conclude that the specific details of Act 64's contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance. Given our holding, we need not, and do not, examine the constitutionality of the statute's presumption that certain party expenditures are coordinated with a candidate. Vt. Stat. Ann., Tit. 17, §2809(d) (2002). Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

NEIL RANDALL, ET AL., PETITIONERS
04–1528 *v.*
WILLIAM H. SORRELL ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL., PETITIONERS
04–1530 *v.*
WILLIAM H. SORRELL ET AL.

WILLIAM H. SORRELL, ET AL., PETITIONERS
04–1697 *v.*
NEIL RANDALL ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE ALITO, concurring in part and concurring in the judgment.

I concur in the judgment and join in JUSTICE BREYER's opinion except for Parts II–B–1 and II–B–2. Contrary to the suggestion of those sections, respondents' primary defense of Vermont's expenditure limits is that those limits are consistent with *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. See Brief for William H. Sorrell et al. in Nos. 04–1528 and 04–1530, pp. 15–28 (hereinafter Sorrell Brief); Brief for Vermont Public Interest Research Group et al. in Nos. 04–1528 and 04–1530, pp. 5–36 (hereinafter VPIRG Brief). Only as a backup argument, an afterthought almost, do respondents make a naked plea for us to "revisit *Buckley*." Sorrell Brief 28; VPIRG Brief 36. This is fairly

incongruous, given that respondents' defense of Vermont's contribution limits rests squarely on *Buckley* and later decisions that built on *Buckley*, and yet respondents fail to explain why it would be appropriate to reexamine only one part of the holding in *Buckley*. More to the point, respondents fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision. Indeed, only once in 99 pages of briefing from respondents do the words "*stare decisis*" appear, and that reference is in connection with *contribution* limits. See Sorrell Brief 31. Such an incomplete presentation is reason enough to refuse respondents' invitation to reexamine *Buckley*. See *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 856 (1996).

Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue.

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[June 26, 2006]

JUSTICE KENNEDY, concurring in the judgment.

The Court decides the constitutionality of the limitations Vermont places on campaign expenditures and contributions. I agree that both limitations violate the First Amendment.

As the plurality notes, our cases hold that expenditure limitations "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Buckley* v. *Valeo*, 424 U. S. 1, 58–59 (1976) *(per curiam)*; see also *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 618 (1996) (principal opinion); *Federal Election Comm'n* v. *National Conservative Political*

Action Comm., 470 U. S. 480, 497 (1985).

The parties neither ask the Court to overrule *Buckley* in full nor challenge the level of scrutiny that decision applies to campaign contributions. The exacting scrutiny the plurality applies to expenditure limitations, however, is appropriate. For the reasons explained in the plurality opinion, respondents' attempts to distinguish the present limitations from those we have invalidated are unavailing. The Court has upheld contribution limits that do "not come even close to passing any serious scrutiny." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410 (2000) (KENNEDY, J., dissenting). Those concerns aside, Vermont's contributions, as the plurality's detailed analysis indicates, are even more stifling than the ones that survived *Shrink*'s unduly lenient review.

The universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions. That new order may cause more problems than it solves. On a routine, operational level the present system requires us to explain why $200 is too restrictive a limit while $1,500 is not. Our own experience gives us little basis to make these judgments, and certainly no traditional or well-established body of law exists to offer guidance. On a broader, systemic level political parties have been denied basic First Amendment rights. See, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 286–287, 313 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part). Entering to fill the void have been new entities such as political action committees, which are as much the creatures of law as of traditional forces of speech and association. Those entities can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen.

Viewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct;

given my own skepticism regarding that system and its operation, however, it seems to me appropriate to concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

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[June 26, 2006]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I agree with the plurality that Vt. Stat. Ann., Tit. 17, §2801 *et seq.* (2002) (Act 64), is unconstitutional, I disagree with its rationale for striking down that statute. Invoking *stare decisis*, the plurality rejects the invitation to overrule *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (per curiam).[1] It then applies *Buckley* to invalidate the expendi-

[1] Although the plurality's *stare decisis* analysis is limited to *Buckley*'s treatment of expenditure limitations, its reasoning cannot be so confined, and would apply equally to *Buckley*'s standard for evaluating contribution limits. See *ante*, at 10 (noting, *inter alia*, that *Buckley* has engendered "considerable reliance" that would be "dramatically undermine[d]" by overruling it now).

ture limitations and, less persuasively, the contribution limitations. I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion. As a result, *stare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment. Accordingly, I concur only in the judgment.

I

I adhere to my view that this Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410–418 (2000) (dissenting opinion) (*Shrink*); *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 465–466 (2001) (*Colorado II*) (dissenting opinion); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 635–644 (1996) (*Colorado I*) (opinion concurring in judgment and dissenting in part). "[U]nlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits." *Id.*, at 640. The *Buckley* Court distinguished contributions from expenditures based on the presence of an intermediary between a contributor and the speech eventually produced. But that reliance is misguided, given that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message." *Colorado I*, *supra*, at 638–639; *Shrink*, *supra*, at 413–418 (Thomas, J., dissenting). Likewise, *Buckley*'s suggestion that contribution caps only marginally restrict speech,

because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," 424 U. S., at 21, even if descriptively accurate, does not support restrictions on contributions. After all, statements of general support are as deserving of constitutional protection as those that communicate specific reasons for that support. *Colorado I*, *supra*, at 639–640 (opinion of Thomas, J.); *Shrink*, *supra*, at 414–415, and n. 3 (Thomas, J., dissenting). Accordingly, I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail. See *Colorado I*, *supra*, at 640–641 (opinion of Thomas, J.) ("I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional"). See also *Colorado II*, *supra*, at 465–466 (Thomas, J., dissenting).

II

The plurality opinion, far from making the case for *Buckley* as a rule of law, itself demonstrates that *Buckley*'s limited scrutiny of contribution limits is "insusceptible of principled application," and accordingly is not entitled to *stare decisis* effect. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., dissenting). Indeed, "'when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.'" *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); internal quotation marks omitted). Today's newly minted, multifactor test, particularly when read in combination with the Court's decision in *Shrink*, *supra*, places this Court in the position of addressing the propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits.

The plurality sets forth what appears to be a two-step

process for evaluating the validity of contribution limits: First, determine whether there are "danger signs" in a particular case that the limits are too low; and, second, use "independent judicial judgment" to "review the record independently and carefully with an eye towards assessing the statute's 'tailoring,' that is, towards assessing the proportionality of the restrictions." *Ante*, at 14. Neither step of this test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence.

As to the first step, it is entirely unclear how to determine whether limits are so low as to constitute "danger signs" that require a court to "examine the record independently and carefully." *Ante*, at 18. The plurality points to several aspects of the Act that support its conclusion that such signs are present here: (1) the limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld. *Ante*, at 15–19.

The first two elements of the Act are indeed constitutionally problematic, but they have no bearing on whether the contribution limits are too low. The first substantially advantages candidates in a general election who did not face a serious primary challenge. In practice, this restriction will generally suppress more speech by challengers than by incumbents, without serving the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof. Cf. B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 50–51 (2001) (hereinafter Smith) (describing the ability of incumbents to amass money early, discouraging serious challengers from entering a race). The second element has no relation to these compelling interests either, given that "'[t]he very aim of a political party is to influence its can-

didate's stance on issues and, if the candidate takes office or is reelected, his votes.'" *Colorado II*, 533 U. S., at 476 (Thomas, J., dissenting) (citing *Colorado I*, 518 U. S., at 646 (Thomas, J., concurring in judgment and dissenting in part)). That these provisions are unconstitutional, however, does not make the contribution limits on individuals unconstitutionally low.

We are left, then, with two reasons to scrutinize Act 64's limitations: They are lower than those of other States, and lower than those we have upheld in previous cases, *i.e.*, *Buckley* and *Shrink*. But the relative limits of other States cannot be the key factor, for such considerations are nothing more than a moving target. After all, if the Vermont Legislature simply persuaded several other States to lower their contribution limits to parallel Act 64, then the Act, which would still "significantly restrict the amount of funding available for challengers to run competitive campaigns," *ante*, at 19, would survive this aspect of the majority's proposed test.

Nor is the relationship of these limits to those in *Buckley* and *Shrink* a critical fact. In *Shrink*, the Court specifically determined that *Buckley* did not "set a minimum constitutional threshold for contribution limits," rejecting such a contention as a "fundamental misunderstanding of what we held." 528 U. S., at 396. The plurality's current treatment of the limits in *Shrink* as a constitutional minimum, or at least as limits below which "danger signs" are present, thus cannot be reconciled with *Shrink* itself.

Having nevertheless concluded that these "danger signs" require us to scrutinize the record, the plurality embarks on an odd review of the contribution limits, combining unrelated factors to determine that, "*taken together*," *ante*, at 19, the restrictions of Act 64 are not closely drawn to meet their objectives. Two of these factors simply cause the already stringent limitations on individual contributions to be more stringent; *i.e.*, volun-

teer services count toward the contribution limit, *ante*, at 25–27, and the limits do not change with inflation, so they will become even more stringent in time, *ante*, at 27.[2] While these characteristics confirm the plurality's impression that these limits are, indeed, quite low, they have nothing whatsoever to do with whether the restrictions are closely drawn to meet their objectives. The plurality would presumably uphold a limit on contributions of $1 million, even if volunteer services counted toward that limit and the limit did not change with inflation. Characterizing these facts as shifting Act 64's limits from "suspiciously low" to "too low," *ibid.*, provides no insight on how to draw this constitutional line.

The plurality next departs from the general applicability of the contribution limits entirely, and notes the substantial interference of the contribution limits with the activities of parties. Again, I do not dispute that the limitation on party contributions is unconstitutional; as I have previously noted, such limitations are unconstitutional even under *Buckley*. See *Colorado II*, *supra*, at 476–477. But it is entirely unclear why the mere fact that the "suspiciously low" contribution limits *also apply to parties* should mean that those limits are in fact "too low" when they are applied to individuals. If the limits impermissibly intrude upon the associational rights of parties, then the limits are unconstitutional as applied to parties. But

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[2] Ironically, the plurality is troubled by the fact that the absence of a provision adjusting the limits for inflation means that the real value of the limits will decline, and that "the burden of preventing the decline [lies] upon incumbent legislators who may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges." *Ante*, at 27. It is impossible to square this wariness of incumbents' disinclination to enact future laws protecting challengers with the plurality's deference to those same incumbents when they make empirical judgments regarding "the precise restriction necessary to carry out the statute's legitimate objectives" in the first place. *Ante*, at 14.

limits *on individuals* cannot be transformed from permissible to too low simply because they also apply to political parties.[3]

We are left, then, with two arguably relevant points to transform these contribution limits from the realm of the "suspicious" to the realm of the impermissible. First, the limits affect a substantial portion of the money given to challengers. But contribution limits always disproportionately burden challengers, who often have smaller bases of support than incumbents. See Smith, 66–70. In *Shrink*, the Court expressly rejected the argument that a negative impact on a challenger could render a contribution limit invalid, relying on the same sort of analysis of the "*average* effect of contribution limits on fundraising," *ante*, at 21, that the plurality today rejects. See 528 U. S., at 396 (noting that 97.62% of all contributors for state auditor made contributions of less than $2,000, and that "[e]ven if we were to assume that the contribution limits affected respondent['s] ability to wage a competitive campaign . . . a showing of one affected individual does not point up a system of suppressed political advocacy "that

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[3]The plurality's connection of these two factors implies that it is concerned not with the impact on the speech of contributors, but solely with the speech of candidates, for whom the two facts might be connected. See *ante*, at 19. Indeed, the plurality notably omits interference with participation in campaigns through monetary contributions from the list of reasons the Act is unconstitutional. See *id.*, at 19, 27. But contributors, too, have a right to free speech. See *Colorado I* 518 U. S. 604, 637 (1996) (THOMAS, J., concurring in judgment and dissenting in part) ("If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy"). Even *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (per curiam), recognizes that contribution limits restrict the free speech of contributors, even if it understates the significance of this restriction. See *id.*, at 20–21 ("[A] limitation upon the amount that any one person or group may contribute to a candidate . . . entails only a marginal restriction upon the contributor's ability to engage in free communication").

would be unconstitutional under *Buckley*"). Cf. *id.*, at 420 (Thomas, J., dissenting) ("The Court in *Buckley* provided no basis for suppressing the speech of an individual candidate simply because other candidates (or candidates in the aggregate) may succeed in reaching the voting public . . . any such reasoning would fly in the face of the premise of our political system—liberty vested in individual hands safeguards the functioning of our democracy"). An individual's First Amendment right is infringed whether his speech is decreased by 5% or 95%, and whether he suffers alone or shares his violation with his fellow citizens. Certainly, the First Amendment does not authorize us to judge whether a restriction of political speech imposes a sufficiently severe disadvantage on challengers that a candidate should be able to complain. See *Shrink*, *supra*, at 427 (Thomas, J., dissenting) ("[C]ourts have no yardstick by which to judge the proper amount and effectiveness of campaign speech").

The plurality's final justification fares no better. Arguing that Vermont offers no justification for imposing a limit lower than that imposed in any other State is simply another way of saying that the benchmark for whether a contribution limitation is constitutional is what other States have imposed. As I have noted above, *supra*, at 6, tying individuals' First Amendment rights to the presence or absence of similar laws in other States is inconsistent with the First Amendment.

The plurality recognizes that the burdens which lead it to invalidate Act 64's contribution limits are present under "many, though not all, campaign finance regulations." *Ante*, at 28. As a result, the plurality does not purport to offer any single touchstone for evaluating the constitutionality of such laws. Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its "independent judicial judgment," *ante*, at 14, that they are

too low. The atmospherics—whether they vary with inflation, whether they are as high as those in other States or those in *Shrink* and *Buckley*, whether they apply to volunteer activities and parties—no doubt help contribute to the plurality's sentiment. But a feeling does not amount to a workable rule of law.

This is not to say that the plurality errs in concluding that these limits are too low to satisfy even *Buckley*'s lenient standard. Indeed, it is almost impossible to imagine that any legislator would ever find his scruples overcome by a $201 donation. See *Shrink*, *supra*, at 425 (Thomas, J., dissenting) ("I cannot fathom how a $251 contribution could pose a substantial risk of 'secur[ing] a political *quid pro quo*'" (quoting *Buckley*, 424 U. S., at 26)). And the statistics relied on by the plurality indeed reveal that substantial resources will be lost by candidates running campaigns under these limits. See *ante*, at 19–22. Given that these contribution limits severely impinge on the ability of candidates to run campaigns and on the ability of citizens to contribute to campaigns, and do so without any demonstrable need to avoid corruption, they cannot possibly satisfy even *Buckley*'s ambiguous level of scrutiny.

But the plurality's determination that this statute clearly lies on the *impermissible* side of the constitutional line gives no assistance in drawing this line, and it is clear that no such line can be drawn rationally. There is simply no way to calculate just how much money a person would need to receive before he would be corrupt or perceived to be corrupt (and such a calculation would undoubtedly vary by person). Likewise, there is no meaningful way of discerning just how many resources must be lost before speech is "disproportionately burden[ed]." *Ante*, at 28. *Buckley*, as the plurality has applied it, gives us license to simply strike down any limits that just *seem* to be too stringent, and to uphold the rest. The First Amendment

does not grant us this authority. *Buckley* provides no consistent protection to the core of the First Amendment, and must be overruled.

* * *

For these reasons, I concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE STEVENS, dissenting.

JUSTICE BREYER and JUSTICE SOUTER debate whether the *per curiam* decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), forecloses any constitutional limitations on candidate expenditures. This is plainly an issue on which reasonable minds can disagree. The *Buckley* Court never explicitly addressed whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits, *post*, at 2 (SOUTER, J., dissenting), yet its silence, in light of the record before it, suggests that it implicitly treated this proposed interest insufficient, *ante*, at 11 (plurality opinion of BREYER, J.). Assuming this to be true, however, I am convinced that *Buckley*'s holding on expenditure limits is wrong, and that

the time has come to overrule it.

I have not reached this conclusion lightly. As JUSTICE BREYER correctly observes, *stare decisis* is a principle of "'fundamental importance.'" *Ante*, at 9. But it is not an inexorable command, and several factors, taken together, provide special justification for revisiting the constitutionality of statutory limits on candidate expenditures.

To begin with, *Buckley*'s holding on expenditure limits itself upset a long-established practice. For the preceding 65 years, congressional races had been subject to statutory limits on both expenditures and contributions. See 37 Stat. 28; Federal Corrupt Practices Act of 1925, 43 Stat. 1073; Federal Election Campaign Finance Act of 1971, 86 Stat. 5; Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263; *United States* v. *Automobile Workers*, 352 U. S. 567, 575–576 (1957); *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 115–117 (2003). As the Court of Appeals had recognized in *Buckley* v. *Valeo*, 519 F. 2d 821, 859 (CADC 1975) (en banc) (*per curiam*), our earlier jurisprudence provided solid support for treating these limits as permissible regulations of conduct rather than speech. *Ibid.* (discussing *Burroughs* v. *United States*, 290 U. S. 534 (1934), and *United States* v. *Harriss*, 347 U. S. 612 (1954)); see also 519 F. 2d, at 841, and n. 41, 851, and n. 68. While *Buckley*'s holding on contribution limits was consistent with this backdrop, its holding on expenditure limits "involve[d] collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

There are further reasons for reexamining *Buckley*'s holding on candidate expenditure limits that do not apply to its holding on candidate contribution limits. Although we have subsequently reiterated the line *Buckley* drew between these two types of limits, we have done so primarily in cases affirming the validity of contribution limits or their functional equivalents. See *McConnell*, 540 U. S., at

134–138; *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 440–442 (2001); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386–387 (2000); cf. *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 194–195 (1981) (plurality opinion). In contrast, these are our first post-*Buckley* cases that raise the constitutionality of expenditure limits on the amounts that candidates for office may spend on their own campaigns.[1]

Accordingly, while we have explicitly recognized the importance of *stare decisis* in the context of *Buckley*'s holding on contribution limits, *McConnell*, 540 U. S., at 137–138, we have never before done so with regard to its rejection of expenditure limits. And *McConnell*'s recognition rested largely on an interest specific to *Buckley*'s holding on contribution limits. There, we stated that "[c]onsiderations of *stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another,* provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." 540 U. S., at 137–138 (emphasis added). This powerful buttress is absent from *Buckley*'s refusal to defer to the Legislature's judgment as to the importance of expenditure limits. Relatedly, while Congress and state legislatures have long relied on *Buckley*'s authorization of contribution limits, *Buckley*'s rejection of expenditure limits "has not induced [comparable] detrimental reliance," *Lawrence* v.

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[1] We have, of course, invalidated limits on independent expenditures by third persons. *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480 (1985); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 (1996); cf. *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986). In these cases the principal parties accepted *Buckley*'s holding on candidate expenditure limits and gave us no cause to consider how much weight to give *stare decisis*.

Texas, 539 U. S. 558, 577 (2003). See also *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (noting lessened *stare decisis* concern where "it is hard to imagine how any action taken in reliance upon [the prior case] could conceivably be frustrated").

Perhaps in partial recognition of these points, Justice White refused to abandon his opposition to *Buckley*'s holding on expenditure limits. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 271 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 507–512 (1985) (dissenting opinion). He believed *Buckley* deeply wrong on this issue because it confused "the identification of speech with its antecedents." *National Conservative Political Action Comm.*, 470 U. S., at 508. Over the course of his steadfast campaign, he converted at least one other *Buckley* participant to this position, see *National Conservative Political Action Comm.*, 470 U. S., at 518–521 (Marshall, J., dissenting), and his reasoning has since persuaded me—the nonparticipating Member of the *Buckley* Court—as well.

As Justice White recognized, it is quite wrong to equate money and speech. *Buckley*, 424 U. S., at 263 (opinion concurring in part and dissenting in part). To the contrary,

> "The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates. The restrictions, to the extent they do affect speech, are viewpoint-neutral and indicate no hostility to the speech itself or its effects." *National Conservative Po-*

litical Action Comm., 470 U. S., at 508–509 (White, J., dissenting).

Accordingly, these limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech. Like Justice White, I would uphold them "so long as the purposes they serve are legitimate and sufficiently substantial." *Buckley*, 424 U. S., at 264.

Buckley's conclusion to the contrary relied on the following oft-quoted metaphor:

> "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at 19, n. 18.

But, of course, while a car cannot run without fuel, a candidate can speak without spending money. And while a car can only travel so many miles per gallon, there is no limit on the number of speeches or interviews a candidate may give on a limited budget. Moreover, provided that this budget is above a certain threshold, a candidate can exercise due care to ensure that her message reaches all voters. Just as a driver need not use a Hummer to reach her destination, so a candidate need not flood the airways with ceaseless sound-bites of trivial information in order to provide voters with reasons to support her.

Indeed, the examples of effective speech in the political arena that did not depend on any significant expenditure by the campaigner are legion. It was the content of William Jennings Bryan's comments on the "Cross of Gold"—and William McKinley's responses delivered from his front porch in Canton, Ohio—rather than any expenditure of money that appealed to their cost-free audiences. Neither Abraham Lincoln nor John F. Kennedy paid for the opportunity to engage in the debates with Stephen Douglas and Richard Nixon that may well have determined the out-

comes of Presidential elections. When the seasoned campaigners who were Members of the Congress that endorsed the expenditure limits in the Federal Election Campaign Act Amendments of 1974 concluded that a modest budget would not preclude them from effectively communicating with the electorate, they necessarily rejected the *Buckley* metaphor.

These campaigners also identified significant government interests favoring the imposition of expenditure limits. Not only do these limits serve as an important complement to corruption-reducing contribution limits, see *id.*, at 264 (opinion of White, J.), but they also "protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising." *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 649–650 (1996) (STEVENS, J., dissenting). These last two interests are particularly acute. When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail "to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government." *Automobile Workers*, 352 U. S., at 590. States have recognized this problem,[2] but *Buckley*'s perceived ban on expenditure limits severely limits their options in dealing with it.

The interest in freeing candidates from the fundraising straitjacket is even more compelling. Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively. That fact was well recognized by backers of the legislation reviewed in *Buckley*, by the Court of Appeals judges who voted to uphold

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[2]See Brief for State of Connecticut et al. as *Amici Curiae* 16–17 (citing Ariz. Rev. Stat. §16–940(B)(7); Colo. Rev. Stat. §1–45–102; Neb. Rev. Stat. §32-1602(1); and R. I. Gen. Laws §17–25–18).

the expenditure limitations in that statute, and by Justice White—who not incidentally had personal experience as an active participant in a Presidential campaign. Cf. 519 F. 2d, at 838 (and citations to legislative history contained therein); 424 U. S., at 265 (opinion of White, J.). The validity of their judgment has surely been confirmed by the mountains of evidence that has been accumulated in recent years concerning the time that elected officials spend raising money for future campaigns and the adverse effect of fundraising on the performance of their official duties.[3]

Additionally, there is no convincing evidence that these important interests favoring expenditure limits are fronts for incumbency protection. *Buckley*'s cursory suggestion to the contrary, *id.*, at 56–57, failed to take into account the mixed evidence before it on this issue. See 519 F. 2d, at 861, 862 (detailing how "[t]he material available to the court looks both ways"). And only by "permit[ting] States nationwide to experiment with these critically needed reforms,"—as 18 States urge us to do—will we enable further research on how expenditure limits relate to our incumbent reelection rates. See Brief for State of Connecticut et al. as *Amici Curiae* 3.[4] In the meantime, a

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[3]See, *e.g.*, Alexander, Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials, 37 Loyola U. Chi. L. J. 669, 673–683 (2006); see also *post*, at 3 (SOUTER, J., dissenting).

[4]Indeed, the example of the city of Albuquerque suggests that concerns about incumbent entrenchment are unfounded. In 1974, the city set expenditure limits on municipal elections. A 2-year interlude aside, these limits applied until 2001, when they were successfully challenged by municipal candidates. *Homans* v. *Albuquerque*, 217 F. Supp. 2d 1197, 1200 (NM 2002), aff'd, 366 F. 3d 900 (CA10), cert. denied, 543 U. S. 1002 (2004). In its findings of fact, the Federal District Court determined that "[n]ationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking

legislative judgment that "enough is enough" should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas.

One final point bears mention. Neither the opinions in *Buckley* nor those that form today's cacophony pay heed to how the Framers would have viewed candidate expenditure limits. This is not an unprincipled approach, as the historical context is "usually relevant but not necessarily dispositive." *Georgia* v. *Randolph*, 547 U. S. ___, ___ (2006) (slip op., at 1) (STEVENS, J., concurring). This is particularly true of contexts that are so different. At the time of the framing the accepted posture of the leading candidates was one of modesty, acknowledging a willingness to serve rather than a desire to compete. Speculation about how the Framers would have legislated if they had foreseen the era of televised sound-bites thus cannot provide us with definitive answers.

Nevertheless, I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities. I think they would have viewed federal statutes limiting the amount of money that congressional candidates might spend in future elections

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reelection." 217 F. Supp. 2d, at 1200 (citation omitted). The court further concluded that the "system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advantage." *Ibid.* While far from conclusive, this example cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage. See also Brief for Center for Democracy and Election Management at American University as *Amicus Curiae* (concluding that Canada, the United Kingdom, New Zealand, and Malta—all of which have campaign expenditure limits—have more electoral competition than the United States, Jamaica, Ireland, and Australia—all of which lack such limits).

as well within Congress' authority.[5] And they surely would not have expected judges to interfere with the enforcement of expenditure limits that merely require candidates to budget their activities without imposing any restrictions whatsoever on what they may say in their speeches, debates, and interviews.

For the foregoing reasons, I agree with JUSTICE SOUTER that it would be entirely appropriate to allow further proceedings on expenditure limits to go forward in these cases. For the reasons given in Parts II and III of his dissent, I also agree that Vermont's contribution limits and presumption of coordinated expenditures by political parties are constitutional, and so join those portions of his opinion.

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[5]See Art. I, §4 (providing that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"); see also §5 (providing that "Each House may determine the Rules of its Proceedings").

SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

NEIL RANDALL, ET AL., PETITIONERS
04–1528 *v.*
WILLIAM H. SORRELL ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL., PETITIONERS
04–1530 *v.*
WILLIAM H. SORRELL ET AL.

WILLIAM H. SORRELL, ET AL., PETITIONERS
04–1697 *v.*
NEIL RANDALL ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, and with whom JUSTICE STEVENS joins as to Parts II and III, dissenting.

In 1997, the Legislature of Vermont passed Act 64 after a series of public hearings persuaded legislators that rehabilitating the State's political process required campaign finance reform. A majority of the Court today decides that the expenditure and contribution limits enacted are irreconcilable with the Constitution's guarantee of free speech. I would adhere to the Court of Appeals's decision to remand for further enquiry bearing on the limitations on candidates' expenditures, and I think the contribution limits satisfy controlling precedent. I respectfully dissent.

I

Rejecting Act 64's expenditure limits as directly contravening *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, *ante*, at 8–11 (opinion of BREYER, J.), is at least premature.

We said in *Buckley* that "expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations," 424 U. S., at 44, but the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the [applicable] exacting scrutiny." *Ibid.* In applying that standard in *Buckley* itself, the Court gave no indication that it had given serious consideration to an aim that Vermont's statute now pursues: to alleviate the drain on candidates' and officials' time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning. Instead, we dwelt on rejecting the sufficiency of interests in reducing corruption, equalizing the financial resources of candidates, and capping the overall cost of political campaigns, see *id.*, at 55–57. Although Justice White went a step further in dissenting from the Court on expenditures, and made something of the interest in getting officials off the "treadmill" driven by the "obsession with fundraising," see *id.*, at 265 (opinion concurring in part and dissenting in part), this lurking issue was not treated as significant on the expenditure question in the *per curiam* opinion. Whatever the observations made to the *Buckley* Court about the effect of fundraising on candidates' time, the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as

thorough a record as we have here.*

Vermont's argument therefore does not ask us to overrule *Buckley;* it asks us to apply *Buckley*'s framework to determine whether its evidence here on a need to slow the fundraising treadmill suffices to support the enacted limitations. Vermont's claim is serious. Three decades of experience since *Buckley* have taught us much, and the findings made by the Vermont Legislature on the pernicious effect of the nonstop pursuit of money are significant. See, *e.g.,* Act 64, H. 28, Legislative Findings and Intent, at App. 20 (finding that "candidates for statewide offices are spending inordinate amounts of time raising campaign funds"); *ibid.* (finding that "[r]obust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased"); see also *Landell* v. *Sorrell,* 118 F. Supp. 2d 459, 467 (Vt. 2000) (noting testimony of Senator Shumlin before the legislature that raising funds "was one of the most distasteful things that I've had to do in public service" (internal quotation marks omitted)); *Landell* v. *Sorrell,* 382 F. 3d 91, 123 (CA2 2004) (public officials testified at trial that "elected officials spend time with donors rather than on their official duties").

The legislature's findings are surely significant enough to justify the Court of Appeals's remand to the District

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*In approving the public funding provisions of the subject campaign finance law, Subtitle H of the Internal Revenue Code, the *Buckley* Court appreciated that in enacting the provision Congress was legislating in part "to free candidates from the rigors of fundraising." 424 U. S., at 91; see also *id.,* at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions"). Recognition of the interest as to Subtitle H, a question of congressional power involving a different evidentiary burden, see *South Dakota* v. *Dole,* 483 U. S. 203, 207 (1987); see also *Buckley, supra,* at 90, does not imply a conclusive rejection of it as to the separate issue of expenditure limits.

Court to decide whether Vermont's spending limits are the least restrictive means of accomplishing what the court unexceptionably found to be worthy objectives. See *id.*, at 124–125, 135–137. The District Court was instructed to examine a variety of outstanding issues, including alternatives considered by Vermont's Legislature and the reasons for rejecting them. See *id.*, at 136. Thus, the constitutionality of the expenditure limits was not conclusively decided by the Second Circuit, and I believe the evidentiary work that remained to be done would have raised the prospect for a sound answer to that question, whatever the answer might have been. Instead, we are left with an unresolved question of narrow tailoring and with consequent doubt about the justifiability of the spending limits as necessary and appropriate correctives. This is not the record on which to foreclose the ability of a State to remedy the impact of the money chase on the democratic process. I would not, therefore, disturb the Court of Appeals's stated intention to remand.

II

Although I would defer judgment on the merits of the expenditure limitations, I believe the Court of Appeals correctly rejected the challenge to the contribution limits. Low though they are, one cannot say that "the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 397 (2000).

The limits set by Vermont are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States. The plurality concedes that on a per-citizen measurement Vermont's limit for statewide elections "is slightly more generous," *ante*, at 18, than the one set by the Missouri statute ap-

proved by this Court in *Shrink, supra*. Not only do those dollar amounts get more generous the smaller the district, they are consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's, some significantly so. See, *e.g.*, *Montana Right to Life Assn.* v. *Eddleman*, 343 F. 3d 1085, 1088 (CA9 2003) (approving $400 limit for candidates filed jointly for Governor and Lieutenant Governor, since increased to $500, see Mont. Code Ann. §13–37–216(1)(a)(i) (2005)); *Daggett* v. *Commission on Governmental Ethics and Election Practices*, 205 F. 3d 445, 452 (CA1 2000) ($500 limit for gubernatorial candidates in Maine); *Minnesota Citizens Concerned for Life, Inc.* v. *Kelley*, 427 F. 3d 1106, 1113 (CA8 2005) ($500 limit on contributions to legislative candidates in election years, $100 in other years); *Florida Right to Life, Inc.* v. *Mortham*, No. 6:98–770–CV, 2000 WL 33733256, *3 (MD Fla., Mar. 20, 2000) ($500 limit on contributions to any state candidate). The point is not that this Court is bound by judicial sanctions of those numbers; it is that the consistency in legislative judgment tells us that Vermont is not an eccentric party of one, and that this is a case for the judicial deference that our own precedents say we owe here. See *Shrink, supra*, at 402 (BREYER, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments"); see also *ante*, at 14 (plurality opinion) ("[O]rdinarily we have deferred to the legislature's determination of [matters related to the costs and nature of running for office]").

To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink*, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted. See *Shrink, supra*, at 391, and n. 5. And deference here would surely not be overly complaisant. Vermont's legislators them-

selves testified at length about the money that gets their special attention, see Act 64, H. 28, Legislative Findings and Intent, at App. 20 (finding that "[s]ome candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions"); 382 F. 3d, at 122 (testimony of Elizabeth Ready: "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call than I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access" (alterations in original)). The record revealed the amount of money the public sees as suspiciously large, see 118 F. Supp. 2d, at 479–480 ("The limits set by the legislature . . . accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public"). And testimony identified the amounts high enough to pay for effective campaigning in a State where the cost of running tends to be on the low side, see *id.*, at 471 ("In the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of $1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of $5 so much that she personally sends thank you notes to those donors"); *id.*, at 470–471 ("In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. . . . Several candidates, campaign managers, and past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of

contribution limits established by Act 64"); *id.*, at 472 ("Spending in Vermont statewide elections is very low .... Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow.... In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters").

Still, our cases do not say deference should be absolute. We can all imagine dollar limits that would be laughable, and per capita comparisons that would be meaningless because aggregated donations simply could not sustain effective campaigns. The plurality thinks that point has been reached in Vermont, and in particular that the low contribution limits threaten the ability of challengers to run effective races against incumbents. Thus, the plurality's limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster. The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break. But this received suspicion is itself a proper subject of suspicion. The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes. See *ante*, at 22 ("the record does contain some anecdotal evidence supporting the respondents' position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can 'amas[s] the resources necessary for effective advocacy,' *Buckley*, 424 U. S., at 21"). I would not discount such evidence that

these low limits are fair to challengers, for the experience of the Burlington race is confirmed by recent empirical studies addressing this issue of incumbent's advantage. See, *e.g.*, Eom & Gross, Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates, 59 Pol. Research Q. 99, 99 (2006) ("Analyses of both the number of contributors and the dollar amount of contributions [to gubernatorial candidates] suggest no support for an increased bias in favor of incumbents resulting from the presence of campaign contribution limits. If anything, contribution limits can work to reduce the bias that traditionally works in favor of incumbents. Also, contribution limits do not seem to increase disparities between gubernatorial candidates in general" (emphasis deleted)); Bardwell, Money and Challenger Emergence in Gubernatorial Primaries, 55 Pol. Research Q. 653 (2002) (finding that contribution limits favor neither incumbents nor challengers); Hogan, The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending, 81 Soc. Sci. Q. 941, 952 (2000) (finding that contribution limits reduce incumbent spending but have no effect on challenger or open-seat candidate spending). The Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments.

III

Four issues of detail call for some attention, the first being the requirement that a volunteer's expenses count against the person's contribution limit. The plurality certainly makes out the case that accounting for these expenses will be a colossal nuisance, but there is no case here that the nuisance will noticeably limit volunteering, or that volunteers whose expenses reach the limit cannot continue with their efforts subject to charging their candi-

dates for the excess. Granted, if the provisions for contribution limits were teetering on the edge of unconstitutionality, Act 64's treatment of volunteers' expenses might be the finger-flick that gives the fatal push, but it has no greater significance than that.

Second, the failure of the Vermont law to index its limits for inflation is even less important. This challenge is to the law as it is, not to a law that may have a different impact after future inflation if the state legislature fails to bring it up to economic date.

Third, subjecting political parties to the same contribution limits as individuals does not condemn the Vermont scheme. What we said in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 454–455 (2001), dealing with regulation of coordinated expenditures, goes here, too. The capacity and desire of parties to make large contributions to competitive candidates with uphill fights are shared by rich individuals, and the risk that large party contributions would be channels to evade individual limits cannot be eliminated. Nor are these reasons to support the party limits undercut by claims that the restrictions render parties impotent, for the parties are not precluded from uncoordinated spending to benefit their candidates. That said, I acknowledge the suggestions in the petitioners' briefs that such restrictions in synergy with other influences weakening party power would justify a wholesale reexamination of the situation of party organization today. But whether such a comprehensive reexamination belongs in courts or only in legislatures is not an issue presented by these cases.

Finally, there is the issue of Act 64's presumption of coordinated expenditures on the part of political parties, Vt. Stat. Ann., Tit. 17, §2809(d) (2002). The plurality has no occasion to reach it; I do reach it, but find it insignificant. The Republican Party petitioners complain that the

related expenditure provision imposes on both the candidate and the party the burden in some circumstances to prove that coordination of expenditure did not take place, thus threatening to charge against a candidate's spending limits some party expenditures that are in fact independent, with an ultimate consequence of chilling speech. See Brief for Respondent/Cross-Petitioner Vermont Republican State Committee et al. 45–46. On the contrary, however, we can safely take the presumption on the representation to this Court by the Attorney General of Vermont: the law imposes not a burden of persuasion but merely one of production, leaving the presumption easily rebuttable. See Tr. of Oral Arg. 39–41 (representation that the presumption disappears once credible evidence, such as an affidavit, is offered); see also Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 48 (the presumption "contributes no evidence and disappears when facts appear. In a case covered by the presumption, a political party need only present some evidence that the presumed fact is not true and the presumption vanishes. . . . Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption" (citations, internal quotation marks, and alterations omitted)). As so understood, the rebuttable presumption clearly imposes no onerous burden like the conclusive presumption in *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 619 (1996) (principal opinion), or the nearly conclusive one in *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 785–786 (1988). Requiring the party in possession of the pertinent facts to come forward with them, as easily as by executing an affidavit, does not rise to the level of a constitutionally offensive encumbrance here. Cf. *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 158, n. 16 (1979) ("To the extent that a presumption imposes an extremely low burden of production—*e.g.*, being satisfied by 'any' evidence—it may well be that its

impact is no greater than that of a permissive inference").

IV

Because I would not pass upon the constitutionality of Vermont's expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates, and because I do not see the contribution limits as depressed to the level of political inaudibility, I respectfully dissent.